No. 95 173

In the Supreme Court of the United States

OCTOBER TERM, 1995

BRIAN J. DEGEN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal district court may, in the exercise of its "inherent" or "supervisory" powers, invoke the "fugitive disentitlement" doctrine to bar a citizen and resident of a foreign country from offering *any* defense against the government's confiscation of millions of dollars worth of his property, merely because the property owner has not traveled to the United States to confront a criminal indictment in a wholly separate case.

RULE 14.1 STATEMENT

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioner hereby provides the following names of parties to this proceeding whose names do not appear in the caption:

Karyn Degen, claimant

Real Property Located at Incline Village, et al., defendants (for a complete list of the defendant properties, see App., *infra*, 33a-36a)

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App., *infra*, 1a-16a) is reported at 47 F.3d 1511. The opinion of the United States District Court for the District of Nevada (App., *infra*, 17a-26a) is reported at 755 F. Supp. 308.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1995. A petition for rehearing was denied on May 5, 1995 (App., *infra*, 38a-39a), and a petition for a writ of certiorari is accordingly due on August 3, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides, in pertinent part, that "[n]o person shall be * * * deprived of life, liberty, or property, without due process of law." Pertinent provisions of 21 U.S.C. § 881(a) and of the Supplemental Rules for Certain Admiralty and Maritime Claims are set forth in the appendix. App., *infra*, 40a.

STATEMENT

In this civil forfeiture action, the United States government confiscated millions of dollars worth of petitioner's real and personal property without allowing him *any* opportunity to be heard in defense. The deprivation of petitioner's property was based on nothing more than an unreviewed finding of probable cause made by a federal magistrate in an *ex parte* proceeding. The Ninth Circuit approved this breathtaking assertion of prosecutorial authority by applying the "fugitive disentitlement" doctrine, according to which — in the Ninth Circuit and elsewhere — a federal court may invoke its "inherent" or "supervisory" powers to "disentitle" alleged fugitives from justice from seeking judicial relief of any kind. Without requiring any showing that Brian Degen had fled from the United States or departed with an intent to avoid prosecution, the Ninth Circuit reasoned that merely because petitioner, a Swiss national, currently resides in Switzerland and has failed to return to the United States to face criminal charges in a separate case, he is a fugitive from justice. On that basis, the court of appeals sustained the district court's decision striking petitioner's claim and ordering that his property be summarily forfeited to the government — without regard to petitioner's numerous (and quite substantial) defenses on the merits.

1. The government commenced this civil forfeiture action on October 24, 1989, against certain real and personal property owned by petitioner Brian J. Degen and his wife, Karyn Degen. According to the government's skeletal complaint, the Degens' property — which includes real property in California, Nevada, and Hawaii estimated by the government to be worth more than

$5.5 million — is forfeitable under 21 U.S.C. § 881(a)(6) because it was "purchased or acquired" by petitioner between 1973 and 1989 "in part or in total" with funds that were "the proceeds of exchanges of controlled substances or funds traceable to" such exchanges. Court of Appeals Excerpt of Record ("ER") 423, 472-94. The government further asserted that the Degens' real property was "used or intended to be used to commit or to facilitate the commission of a controlled substances violation" and was therefore "subject to forfeiture pursuant to 21 U.S.C. § 881(a)(7)." ER 424. In support of its complaint, the government filed an affidavit of a Drug Enforcement Agency (DEA) agent, alleging that Ciro Mancuso and petitioner were part of a marijuana smuggling operation and recounting various alleged instances of smuggling by Mancuso, petitioner, or both. ER 474-94. The affidavit relied heavily on information obtained from confidential informants.

On the strength of the complaint and DEA affidavit, the government, in an *ex parte* proceeding before a federal magistrate on October 24, 1989, obtained a warrant authorizing the seizure of the Degens' property. On the same day that the government commenced this forfeiture action and obtained authorization to seize the Degens' property, a federal grand jury in Nevada returned an indictment charging petitioner, Mancuso, and others with distribution of marijuana, money laundering, and other violations of law.

Petitioner and his wife timely filed separate verified claims to their property and verified answers to the government's complaint. ER 404, 412; Court of Appeals Supplemental Excerpt of Record ("SER") 2, 9. In his sworn answer, petitioner "denie[d] that he purchased or acquired the properties referenced in the Complaint * * * from 1973 through 1989 by paying for them in part or in total with the proceeds of exchanges of controlled substances or funds traceable to exchanges of controlled substances." ER 414. He also denied the government's claim that the property had been used to commit or to facilitate the commission of a controlled substances violation (and thus were forfeitable under 21 U.S.C. § 881(a)(7)). ER 414, 423-24. Petitioner raised eight affirmative defenses, including that the government's claims, which rested on allegations dating back to the late 1960s, were barred by the appli-

cable five-year statute of limitations. See ER 415-16. He also challenged the legality of the *ex parte* seizure of his property, arguing that the complaint and affidavit failed to establish probable cause. ER 416.

On May 2, 1990, the government filed a motion to strike the claims and answers of both Brian and Karyn Degen, and in the alternative for summary judgment. ER 380-90. The government maintained that Brian Degen (a Swiss citizen) was "a federal fugitive" because he was "living in Switzerland and has no intention of returning to the United States" to face the pending criminal charges. ER 380, 383. Invoking the Ninth Circuit's decisions in *United States* v. *$129,374 in United States Currency*, 769 F.2d 583 (1985), cert. denied, 474 U.S. 1086 (1986), and *Conforte* v. *Commissioner*, 692 F.2d 587 (1982), the government argued that as a fugitive, petitioner was precluded under the "fugitive disentitlement" doctrine from offering any defense to the government's efforts to take his property.

Brian and Karyn Degen filed a joint opposition to the government's motion. ER 291-379. In it, they explained in considerable detail (see ER 301-16) that the properties had been purchased *not* with the proceeds of illegal drug trafficking but rather with profits from some twenty years of their work in a variety of real estate and construction ventures, with rental income from real estate and business properties, with profits from the Degens' storage business in Hawaii, with money inherited by Karyn Degen, and with capital contributions and investments from Brian Degen's affluent parents (who "own a building construction business in Sacramento and have been involved in real estate investment and building construction for many years" (ER 302-03)). The Degens provided extensive documentary support for these claims, including copies of deeds, escrow statements, cancelled checks, and bank account records. See ER 331-79.

In opposing the government's motions, petitioner also observed that there is "a substantial split among the lower courts" concerning whether "the * * * disentitlement doctrine can be extended to a civil forfeiture action." ER 294 (citing *United States* v. *$83,320 in United States Currency*, 682 F.2d 573 (6th Cir. 1982), and *United States* v. *Pole No. 3172, Hopkinton*, 852 F.2d 636 (1st Cir. 1988), as cases holding the doctrine inapplicable).

In addition, petitioner argued that he was not a fugitive because he "did not leave the U.S. with knowledge of [a] pending criminal * * * action" (ER 295); that none of the purposes underlying the disentitlement doctrine would be served by applying it to him (ER 295, 298-99, 326); that it would violate due process to apply the fugitive disentitlement doctrine to deprive him of property without any opportunity to be heard (ER 298, 316-26); and that disentitlement would be grossly inequitable in this case because the government was "recklessly claim[ing] property that is patently not subject to forfeiture" (ER 300; see also ER 299).

2. On December 31, 1990, the district court granted the government's motion in relevant part and ordered petitioner's claim stricken. App., *infra*, 17a-26a. See also *id.* at 27a-29a. At the outset, it rejected petitioner's argument that he is not a fugitive.[1] "[W]hether Brian left before or after the indictment," the court explained, "is irrelevant": "to be a fugitive, a person need not flee the state or country with the intent of avoiding a prosecution or an anticipated prosecution." *Id.* at 18a. Rather, it was enough that petitioner is in a foreign country and has failed to return to face charges of which he is aware. *Ibid.* See also *id.* at 23a ("In defining a fugitive, culpability lies in knowing that a prosecution is pending and refusing to return to the jurisdiction.").

The court also rejected petitioner's claim that the disentitlement doctrine is inapplicable to this civil forfeiture proceeding. App., *infra*, 18a-20a. The court recognized that the doctrine originated in the context of appeals from criminal convictions but pointed out that the Ninth Circuit had since extended the doctrine to the civil context. *Id.* at 18a-19a. The district court concluded that petitioner was disentitled from defending against the forfeiture, and accordingly it refused to consider petitioner's "many pages" of detailed and well-documented "assertions that he acquired the property in question with legitimate funds," explaining that those

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[1] The record establishes that petitioner moved to Switzerland well before the October 1989 indictment. ER 290, 394; App., *infra*, 2a, 5a, 18a, 20a.

claims "may well be true" but could not be considered because Degen was disentitled from offering any defense. *Ibid.*[2]

3. The court of appeals affirmed, holding that the disentitlement doctrine bars petitioner from offering any defense to the government's confiscation of his property. App., *infra*, 1a-16a. The court acknowledged that the fugitive disentitlement doctrine was developed by this Court in the context of direct criminal appeals, where "a criminal defendant fled after being convicted, and the Court held that his escape 'disentitle[d him] to call upon the resources of the Court for [the] determination of his' direct appeal." *Id.* at 3a (quoting *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970)). Despite these limited origins, the court explained, the doctrine "applies in more contexts that just direct criminal appeals" and has been "extended" by the circuit courts "to disentitle fugitives from participating in *civil proceedings* related to the criminal cases they have fled." App., *infra*, 4a (emphasis added). "More specifically," the panel continued, the courts of appeals have applied the doctrine "on a regular basis * * * in the context of civil forfeiture claims." *Ibid.* (citing cases). To be sure, the court acknowledged, this case requires a further extension of the disentitlement doctrine because in previous Ninth Circuit cases, "the claimants ha[d] fled after being convicted in a related criminal proceeding" whereas petitioner had not been convicted of the crimes charged in the indictment. *Id.* at 5a. The court concluded, however, that distinction "does not * * * compel a finding that the fugitive disentitlement doctrine does not apply" because:

[2] On December 2, 1992, almost two years after the district court ordered petitioner's claim stricken, the government filed a second motion for summary judgment against Karyn Degen. App., *infra*, 3a, 8a, 27a-29a; ER 89. In support of that motion, the government filed three new affidavits of Ciro Mancuso, Michael McCreary, and Catherine Bryant. App., *infra*, 3a; see ER 67-88. When Karyn failed to file a responsive memorandum as required by Nevada Local Rule 140-6, the district court on June 23, 1993, entered summary judgment in the government's favor. App., *infra*, 3a, 9a-10a, 30a. The district court entered an amended final judgment on August 17, 1993. *Id.* at 32a-37a; ER 3-5, 15.

> The doctrine rests on the premise that "the fugitive from justice has demonstrated such disrespect for the legal processes that he has no right to call upon the court to adjudicate his claim." *Ortega-Rodriguez*[v. *United States*], 113 S. Ct. [1199,] 1206 [(1993)] (internal quotations and citation omitted). Although Brian has not been arrested or tried, he has certainly "demonstrated disrespect" for the district court *by refusing to submit to its jurisdiction in the criminal action.*

Ibid. (emphasis added).

Having concluded that the disentitlement doctrine is fully applicable to this case, the panel went on to uphold the district court's conclusion that Brian Degen is a fugitive within the meaning of the doctrine. App., *infra*, 5a. In the panel's view, the fact that Degen knew "in December 1990" (when the district court ordered his claim stricken) that "he had been indicted in Nevada but refused to return" was sufficient to qualify him as a fugitive from justice. *Ibid.*[3]

4. On May 5, 1995, the court of appeals denied Degen's petition for rehearing and suggestion for rehearing en banc. App. *infra*, 38a-39a. The panel did, however, add a footnote to its opinion making clear that the disentitlement doctrine was being applied to petitioner in derogation of his constitutional rights. *Id.* at 8a n.2, 39a. The court of appeals explained that "[w]hile this appeal was pending," this Court issued its decision in *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492 (1993), and that "[i]f not for Brian's fugitive status, the rule of *Good* would apply to this case." App., *infra*, 8a n.2, 39a. The panel held, however, that "the fugitive disentitlement doctrine precludes Brian from contesting the government's seizure of his property" under *Good*. *Ibid.*

[3] The court of appeals also rejected the argument that petitioner lost any fugitive status he might have had when he was taken into the custody of Swiss authorities who were acting at the behest of U.S. prosecutors. App., *infra*, 5a-7a. In rejecting that argument, the court observed that, even if Degen were currently "incarcerated in a foreign jurisdiction," that would "not preclude application of the fugitive disentitlement doctrine." *Id.* at 7a.

REASONS FOR GRANTING THE PETITION

This case involves an assertion of prosecutorial authority that strikes at the very heart of the constitutional guarantee of due process of law. In this civil forfeiture proceeding, the United States government succeeded in depriving petitioner and his wife of real and personal property worth — by the government's own estimation — more than $5 million, without allowing petitioner *any opportunity whatsoever* to be heard in defense. The Ninth Circuit approved this result by relying on an old doctrine of criminal appellate procedure known as "fugitive disentitlement," according to which a federal court may, in the exercise of its "inherent" or "supervisory" powers, dismiss the direct appeal from a criminal conviction if the appellant escapes from prison, jumps bond, or otherwise flees from the court's jurisdiction. Following (indeed, *extending*) established circuit precedent, the court of appeals invoked this doctrine in the very different context of a civil forfeiture proceeding, and did so notwithstanding the fact that the government had made no showing that petitioner departed the United States with the intent to avoid prosecution. On the contrary, the Ninth Circuit held that petitioner is a fugitive from justice and thus deserving of the sanction of disentitlement merely because he resides in a foreign country and has failed to travel to this country to face charges.

The petition should be granted to resolve what the Solicitor General recently described as a "longstanding conflict in the circuits" that "may call for review by this Court in an appropriate case." U.S. Br. in Opp. 16, *Alvarez* v. *United States*, Nos. 94-636 and -943 (Jan. 11, 1995). As explained below, the courts of appeals have provided sharply conflicting answers to the question whether the fugitive disentitlement doctrine may ever be invoked in a civil forfeiture action to prevent a property owner from offering a defense of his property. This case provides an appropriate vehicle to clarify this important and recurring issue of federal law. Further review is also warranted because the Ninth Circuit's decision is fundamentally wrong.

A. As The Solicitor General Has Previously Acknowledged, The Circuits Are Deeply Divided Over Whether The "Fugitive Disentitlement Doctrine" May Be Invoked In A Civil Forfeiture Proceeding To Bar A Property Owner From Defending Against The Government's Confiscation Of Property.

Only seven months ago, in *Alvarez* v. *United States*, Nos. 94-636 and 94-943, the Solicitor General acknowledged the "long-standing conflict in the circuits" on the question whether the disentitlement doctrine may be invoked to prevent a claimant from defending against the forfeiture of his property. U.S. Br. in Opp. 16. That concession — which the government added "may call for review by the Court in an appropriate case"(*ibid.*) — was entirely correct: While the Second, Third, Eighth, Ninth, Tenth and Eleventh Circuits have upheld the disentitlement doctrine in forfeiture actions, the First, Sixth, and Seventh Circuits have flatly rejected it. This case is an appropriate vehicle for resolving that conflict.

1. The decision below reflects the Ninth Circuit's typically broad application of the disentitlement doctrine. See App., *infra*, 4a. Almost thirteen years ago, in *Conforte* v. *Commissioner*, 692 F.2d 587, 589 (1982), the Ninth Circuit rejected the argument that the doctrine applies "only to appeals of criminal convictions" and disentitled a taxpayer from appealing a tax court's judgment of deficiency. The disentitlement doctrine, the court explained, "should apply with greater force in civil cases where an individual's liberty is not at stake." *Ibid.* Three years later, the Ninth Circuit applied the doctrine in a civil forfeiture action to bar intervention by a fugitive property owner's successor-in-interest. See *United States* v. *$129,374 in United States Currency*, 769 F.2d 583, 587-90 (1985), cert. denied, 474 U.S. 1086 (1986). In so ruling, the Ninth Circuit acknowledged that the Sixth Circuit had reached a conflicting decision on the question, and expressly "decline[d] to adopt the Sixth Circuit's reasoning." *Id.* at 589; see also *id.* at 587.

The Second Circuit has also held that the fugitive disentitlement doctrine may be applied in a civil forfeiture proceeding. In *United States* v. *$45,940 in United States Currency*, 739 F.2d 792

(2d Cir. 1984), the court of appeals acknowledged that this Court had "never extended" the fugitive disentitlement doctrine "to civil matters relating to the criminal fugitive." *Id.* at 797. Nonetheless, the Second Circuit upheld the district court's disentitlement of a property owner from seeking to recover property forfeited to the government. In the Second Circuit's view, the property claimant "waived his right to due process in the civil forfeiture proceeding by remaining a fugitive." *Id.* at 798. See also *United States* v. *Eng*, 951 F.2d 461, 464-67 (1991) (disentitling a claimant who was incarcerated in a foreign country); *id.* at 465, 466-67 (attempting to distinguish contrary First and Sixth Circuit authority).

The Tenth Circuit recently sided with the Second and Ninth Circuits. In *United States* v. *Timbers Preserve, Routt County, Colorado*, 999 F.2d 452 (1993), the court upheld the denial of a fugitive property owner's motion to set aside a default judgment forfeiting real property to the government. The court acknowledged that previous Tenth Circuit decisions had applied the fugitive disentitlement doctrine "only in the criminal context" and that "[t]he Supreme Court has not applied the disentitlement doctrine in the civil context." *Id.* at 453. Nevertheless, relying on Second and Ninth Circuit decisions approving such an extension, the Tenth Circuit held that the doctrine could be applied in a civil forfeiture action. *Id.* at 453-54, 456.

The Eleventh Circuit has taken the same view, applying the doctrine to bar an owner of real property from defending the government's forfeiture of the property. *United States* v. *One Parcel of Real Estate at 7707 S.W. 74th Lane, Miami, Dade County, Florida*, 868 F.2d 1214, 1215-17 (1989). The Eleventh Circuit held that the trial court had no duty to "take testimony and make a finding of probable cause that the allegations in the forfeiture complaint were true," because, in the court's view, the claimant had "waived his right to due process in the civil forfeiture proceeding" and could "remedy any hardship by simply submitting himself to the authority of the courts." *Id.* at 1217 (internal quotations omitted). In reaching this conclusion, the Eleventh Circuit pointedly refused to follow the Sixth Circuit's "contrary conclusion" (*id.* at 1216 n.4).

The Third and Eighth Circuits have also endorsed the view that disentitlement may be employed in civil forfeiture cases. In *United States* v. *Contents of Accounts Nos. 3034504504 and 144-07143 At Merrill, Lynch, Pierce, Fenner and Smith, Inc.*, 971 F.2d 974 (1992), the Third Circuit, citing *Eng*, observed in dictum: "[W]e believe the holding of the United States Court of Appeals for the Second Circuit that fugitive disentitlement does apply in forfeiture proceedings is persuasive." *Id.* at 986 n.9. District courts in the Third Circuit have used the disentitlement doctrine against property owners in several forfeiture cases. See *id.* at 976, 986 & n.9 (explaining that district court relied on this ground); *United States* v. *All Monies in Account No. 400 6050975 00*, 1992 U.S. Dist. LEXIS 16930 (E.D. Pa. Nov. 4, 1992). In an unpublished decision, the Eighth Circuit affirmed a district court's use of the disentitlement doctrine to dismiss a fugitive's claim to property in a civil forfeiture proceeding. *United States* v. *One Parcel of Real Property Described as Lot 156 and the South Three Feet of Lot 157, Valley View Estates*, 1992 U.S. App. LEXIS 29278, at *3-*4 (8th Cir. 1992) (per curiam) (acknowledging intercircuit conflict), aff'g in pertinent part 776 F. Supp. 482, 484 (W.D. Mo. 1991) ("The doctrine applies equally as well in civil forfeiture cases as it does in criminal cases."). But see 8th Cir. Rule 28A(k) (limiting citation of unpublished decisions).

2. By contrast, the Sixth, First, and Seventh Circuits have refused to apply the fugitive disentitlement doctrine in civil forfeiture proceedings. In *United States* v. *$83,320 in United States Currency*, 682 F.2d 573 (1982), the Sixth Circuit declined to "extend the reasoning" of the disentitlement cases involving criminal appeals, a context the court regarded as "distinguishable," "to an appeal from a forfeiture judgment brought when a claimant to the defendant property is a fugitive from justice in a related criminal proceeding." *Id.* at 576. The court explained:

> In a [civil] forfeiture proceeding * * * the individual accused of the related criminal violation is not necessarily the only individual with a direct, litigable interest in the outcome of the forfeiture action. * * * The escape of the criminal defendant should not be raised as a bar to those who may have a legitimate, innocent interest in exonerating the defendant property from its wrongdoing. If the currency in the

present case, for example, derived from a legitimate business, as is alleged by the claimant, then creditors and employees of that business might well have an interest in the funds irrespective of the criminal conduct of the claimant or his escape from custody.

Ibid.

In *United States* v. *Pole No. 3172, Hopkinton*, 852 F.2d 636 (1988), the First Circuit likewise refused to permit the use of the disentitlement doctrine in a civil forfeiture case. The court of appeals gave three reasons for its holding. First, it explained that "[o]ne of the main considerations" animating the disentitlement doctrine — the lack of mutuality that arises whenever a fugitive seeks relief but is unwilling to be bound by an adverse decision — "does not arise" in a civil forfeiture action because the claimant cannot "avoid the rigors of an adverse determination by failing to appear." *Id.* at 643 (internal citations omitted). Second, the court explained that the government had failed to demonstrate, as it must, that the civil forfeiture action was "closely related to the criminal matter from which the applicant is a fugitive." *Id.* at 643-44. Third, "there is no evidence that [the claimant] had notice of this [*i.e.*, the forfeiture] proceeding, and elected not to defend it." *Id.* at 644.[4] This was important, the court explained, because without such evidence there is no basis for concluding that the claimant was "acting willfully and hiding from the [forfeiture] court while asking it to resolve his claims." *Ibid.* Unless the fugitive is "purposely avoiding" the court entertaining *the forfeiture action* or "flauting [sic] *its* processes," the claimant "should be treated * * * like any other absent civil litigant." *Ibid.* Although based in part on the circumstances of the case, much of the First Circuit's reasoning applies with equal force to most if not all civil forfeiture actions.

Most recently, the Seventh Circuit flatly held that the disentitlement doctrine is "inappropriate when applied by a district court to civil forfeitures." *United States* v. *$40,877.59 in U.S. Currency*, 32 F.3d 1151, 1156 (1994).[5] The Seventh Circuit noted that the disentitlement doctrine was developed by this Court "as an equitable doctrine of criminal appellate procedure," and has never been applied by this Court in "any case in which the doctrine was used by a district court in a civil forfeiture proceeding to bar a fugitive from asserting a claim to the property." *Id.* at 1152-53. Nevertheless, the court observed, "[s]ome circuits have expanded the doctrine, using it in civil suits against a fugitive from a separate criminal case who seeks *affirmative relief* from the court," and "[f]our circuits" — the Second, Ninth, Tenth, and Eleventh — "have expanded the doctrine further, upholding its use by district courts in civil forfeiture proceedings to bar fugitives from *defending against* the confiscation of their property by the United States government." *Id.* at 1153 (emphasis added). In contrast, the Seventh Circuit observed, the Sixth Circuit "has disallowed the use of the doctrine in civil forfeitures" and the First Circuit has "rejected the use of the doctrine in [a] particular case." *Id.* at 1153. In siding with the First and Sixth Circuits,[6] the Seventh Circuit concluded that application of the disentitlement doctrine in a forfeiture case would violate the Due Process Clause of the Fifth Amendment,[7] conflict with numerous decisions of this

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[4] This was true because the fugitive's claim in the district court, and appeal to the First Circuit, had been advanced by a person to whom he had previously granted a power of attorney. See 852 F.2d at 638.

[5] In the past year, the Seventh Circuit has twice reaffirmed this holding. See *United States* v. *$32,420 in United States Currency*, 1994 U.S. App. LEXIS 31628, *2-*5 & n.1 (7th Cir. Nov. 7, 1994) (unreported) (explaining that Seventh Circuit's position "may represent the minority opinion in the circuits" and that the Sixth Circuit also "disallow[s] the use of the fugitive disentitlement doctrine in civil forfeiture cases generally"); *United States* v. *Michelle's Lounge*, 39 F.3d 684, 690 (7th Cir. 1994) (explaining that "the disentitlement doctrine is inapplicable in civil forfeiture proceedings").

[6] Recognizing "the possibility that [its] opinion creates tension between the circuits," the panel decided *sua sponte* to circulate its decision "among all judges in active service pursuant to Seventh Circuit Rule 40(f)." 32 F.3d at 1153 n.1. "No judge" of that circuit, however, "favored a rehearing en banc." *Ibid.*

[7] A California appellate court has adopted a similar analysis in a different civil context. See *Doe* v. *Superior Court (Polanski)*, 222 Cal.

Court (including the disentitlement cases of *United States* v. *Sharpe*, 470 U.S. 675 (1985), and *Ortega-Rodriguez* v. *United States*, 113 S. Ct. 1199 (1993)), and effectively nullify statutory rights and remedies prescribed in the forfeiture laws by Congress.[8]

3. Not surprisingly, this fundamental conflict in the circuits has not gone unnoticed. As explained above, the conflict has been expressly acknowledged by the Second, Seventh, Eighth, Ninth, and Eleventh Circuits. Recently it was duly noted by the Sixth Circuit as well. *In re Prevot*, 1995 U.S. App. LEXIS 17014, at *17-26 & n.10 (July 14, 1995). The district courts have likewise noted the conflict, see, *e.g.*, *United States* v. *Certain Real*

App. 3d 1406, 1408-11, 272 Cal Rptr. 474, 474-77 (2d Dist. App. 1992) (Due Process Clause of fourteenth amendment forbids application of fugitive disentitlement doctrine to strike answer of defendant in civil action for damages).

[8] The remaining circuits — D.C., Fourth and Fifth — have not directly ruled on the doctrine's applicability to civil forfeiture actions. Notably, however, the D.C. Circuit, which traditionally has given an expansive reading to the doctrine, see *Doyle* v. *United States Dep't of Justice*, 668 F.2d 1365 (D.C. Cir. 1981), cert. denied, 455 U.S. 1002 (1982), recently suggested that it would apply the doctrine much more narrowly in the future. In *Friko Corp.* v. *Commissioner of Internal Revenue*, 26 F.3d 1139 (1994), the D.C. Circuit vacated and remanded for reconsideration in light of *Ortega-Rodriguez* a Tax Court order disentitling an alleged fugitive from petitioning for reconsideration of a tax deficiency. *Id.* at 1142-43. Pointing to this Court's statement in *Ortega-Rodriguez* that there must be "'some connection' * * * between the fugitive status of the litigant and the court invoking the doctrine," Judge Randolph queried what that connection might be since the indictment from which the taxpayer allegedly was a fugitive was pending not in the District of Columbia, but in federal court in New Jersey. *Id.* at 1143 (quoting 113 S. Ct. at 1205-06 & n.15). Quoting the First Circuit's decision in *Pole No. 3172*, the D.C. Circuit observed that the taxpayer's appeal "raises serious questions regarding * * * whether the [disentitlement] doctrine applies when the fugitive is in effect defending against governmental action rather than using the courts affirmatively in an attempt 'to reap the benefit of the judicial process without subjecting himself to an adverse determination.'" *Id.* at 1142-43 (quoting 852 F.2d at 643-45).

Property and Premises Known as 218 Panther Street, Newfoundland, Pa., 745 F. Supp. 118 (E.D.N.Y. 1990), aff'd, 951 F.2d 461 (2d Cir. 1991); *United States* v. *$182,980.00 U.S. Currency*, 727 F. Supp. 1387, 1388 (D. Colo. 1990); *Korkala* v. *United States Customs Service*, 1989 U.S. Dist. LEXIS 7902, at *13 (D.N.J. 1989); *United States* v. *Collins*, 651 F. Supp. 1177, 1179 (S.D. Fla. 1987), as have academic commentators, see, *e.g.*, John G. Kester, *Some Myths of United States Extradition Law*, 76 Geo. L.J. 1441, 1458-59 & n.101 (1988) (the "courts of appeal are in conflict" on issue); 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 9.04[5], at 9-68.19 to 9-70 (Matthew Bender 1991 & Cum. Supp. June 1995) (noting and describing conflict).

The deep conflict in the circuits shows no sign whatsoever of abating. On the contrary, as explained above, the Seventh Circuit panel that decided *$40,877.59* decided *sua sponte* to circulate that decision to the entire court; not a single judge voted to rehear the case en banc. See note 6, *supra*. Conversely, the Ninth Circuit in this case refused petitioner's request that it rehear the panel's decision en banc to reconsider, in light of *$40,877.59* and other authorities, that circuit's longstanding rule permitting use of the disentitlement doctrine in this context. Not a single judge on the Ninth Circuit asked for a vote on this issue. App., *infra*, 39a. Further review by this Court is accordingly warranted.

4. The government would be hard-pressed to deny either the existence of the conflict or its significance. In opposing Brian Degen's rehearing petition in the Ninth Circuit, the government "readily acknowledge[d]" that the panel's decision conflicts with the Seventh Circuit's decision in *$40,877.59*. U.S. Resp. 2-3. The Solicitor General, moreover, recently told this Court that *$40,877.59* only "deepens a longstanding conflict in the circuits over the government's ability to invoke the doctrine at all in such a case." U.S. Br. in Opp. 16, *Alvarez* v. *United States*, Nos. 94-636 and -943 (filed Jan. 11, 1995). The Solicitor General also frankly conceded that this "longstanding conflict in the circuits" "may call for review by this Court in an appropriate case." *Ibid.*

This is such a case.[9] It squarely presents the issue for this Court's decision. In addition, the Ninth Circuit, in denying rehearing, candidly acknowledged that application of the disentitlement doctrine to petitioner had the effect of nullifying his due process rights, under *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492 (1993), to a hearing to contest the initial seizure of his property. App., *infra*, 8a n.2, 39a. The case accordingly also presents the issue whether a federal district court may rely on its "inherent" or "supervisory" powers to vitiate rights conferred by the United States Constitution.

B. The Ninth Circuit's Decision Is Manifestly Incorrect And At Odds With Many Of This Court's Decisions.

Further review is also warranted to correct the Ninth Circuit's analysis, which is flawed in numerous respects. The Ninth Circuit's use of the disentitlement doctrine stretches that doctrine well beyond the limits recognized by this Court or sanctioned by the doctrine's purposes. The decision below is also irreconcilable with a substantial number of this Court's decisions.

1. The disentitlement doctrine is an equitable doctrine of appellate procedure articulated originally by this Court. It holds, quite simply, that "an appellate court may dismiss the appeal of a [criminal] defendant who is a fugitive from justice during the pendency of his appeal." *Ortega-Rodriguez*, 113 S. Ct. at 1203. The Court has identified various rationales for the doctrine: (1) an appellate court cannot enforce an unfavorable judgment against a fugitive (*Smith* v. *United States*, 94 U.S. 97 (1876)); (2) a

[9] None of the factors that formed the basis of the government's successful opposition to certiorari in *Alvarez* (see 115 S. Ct. 1092 (Feb. 21, 1995)) is present here. In *Alvarez*, the petitioners had never challenged, in the lower courts, the applicability *vel non* of the fugitive disentitlement doctrine to civil forfeiture actions; had focused instead on various "fact-bound contentions" that "do not merit further review"; had failed to contest the district court's conclusion that they were "fugitives"; and had failed to cite "any of the prior conflicting authority" on this question and, at least in the *Alvarez* petition (No. 94-636), to "note[] the existence of the Seventh Circuit's decision" in *$40,877.59*. U.S. Br. in Opp. 9-11, 15-17.

fugitive's "escape * * * disentitles [him] to call upon the resources of the Court for determination of his claims" (*Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970) (per curiam)); and (3) disentitlement serves a "deterrent function and advances an interest in efficient, dignified appellate practice" (*Ortega-Rodriguez*, 113 S. Ct. at 1204-05).

Despite the very limited context in which this Court has applied the disentitlement doctrine,[10] several courts of appeals have greatly expanded the doctrine, holding that a defendant who is a fugitive from justice in a criminal case may be disentitled from seeking *affirmative* relief in a *separate civil* action. What is more, some courts of appeals have extended the doctrine even further, holding that a fugitive from a criminal conviction may be disentitled even from *defending* against the confiscation of his property in a separate forfeiture proceeding initiated by the government. And even though the cases in which this Court has applied the disentitlement doctrine all have involved persons already convicted of crimes, the courts of appeals (including the Ninth Circuit in this case) have wielded the sanction of disentitlement against persons who have never been arrested, tried or convicted, and whose innocence accordingly must be presumed.

The Ninth Circuit's use of the disentitlement doctrine in this case runs afoul of the limits articulated in two of this Court's disentitlement decisions: *United States* v. *Sharpe*, 470 U.S. 675 (1985), and *Ortega-Rodriguez*. In *Sharpe*, the Court granted the government's certiorari petition to review a judgment reversing the respondents' criminal conviction. After certiorari had been granted, the respondents became fugitives. The Court refused to

[10] This Court's disentitlement cases share three important features: the doctrine was applied in the *very proceeding* from which the appellant had become a fugitive; the fugitive was seeking *affirmative relief* from the Court (reversal of a conviction); and the person was a "fugitive" in the core sense of the word (someone who had either escaped from custody or jumped bail, not someone who merely had failed to travel to the United States from his country of residence). See *Ortega-Rodriguez*, 113 S. Ct. 1199; *Molinaro*, 396 U.S. 365; *Eisler* v. *United States*, 338 U.S. 189 (1949); *Bonahan* v. *Nebraska*, 125 U.S. 692 (1887); *Smith*, 94 U.S. 97. See also *Goeke* v. *Branch*, 115 S. Ct. 1275 (1995) (per curiam).

vacate the judgment and remand with instructions to dismiss the appeals on disentitlement grounds, however, because such action "is not supported by our precedents." *Id.* at 681 n.2. The disentitlement doctrine, the Court explained,

> concerns the situation in which a fugitive defendant is the party *seeking review here.* In those *very different* cases, dismissal of the petition or appeal is based on the equitable principle that a fugitive from justice is "disentitled" to *call upon this Court* for a review of his conviction. This equitable principle is wholly irrelevant when the defendant has had his conviction nullified and the *government* seeks review here.

Id. at 681-82 n.2 (emphases added) (citations omitted). Thus, in the only one of this Court's disentitlement cases in which the fugitive was *not* making an affirmative demand upon the judicial system, the Court refused to apply the doctrine.

Under *Sharpe*, the disentitlement doctrine applies *only* where the fugitive is the one affirmatively seeking judicial action. Thus, assuming, *arguendo*, that the doctrine can be extended to *civil* cases at all, it surely does not apply where, as here, the alleged fugitive is not making a demand for judicial action but merely *defending* against a suit by the government to take his property. See *$40,877.59*, 32 F.3d at 1154; *Pole No. 3172*, 852 F.2d at 643; *Societe Internationale* v. *Rogers*, 357 U.S. 197, 210-11 (1958); *Friko*, 26 F.3d at 1142; see also App., *infra*, 24a (petitioner "clearly has the status of a defendant"). But see *Eng*, 951 F.2d at 466 ("Who initiates the proceedings * * * is not a relevant consideration for purposes of the disentitlement doctrine").

The Ninth Circuit's decision is also inconsistent with this Court's reasoning in *Ortega-Rodriguez*. In that case, the Court held that an appellate court may not dismiss the appeal of a defendant who becomes a fugitive *after* his conviction but who is recaptured *before* the filing of his appeal, because the defendant's fugitivity lacks sufficient connection to the appellate process. 113 S. Ct. at 1205-10. To reach that result, the *Ortega-Rodriguez* Court looked to the purposes animating the doctrine and considered whether those purposes would be served by application to this new situation. The "enforceability" concern underlying the disentitlement doctrine, the Court reasoned, is not present when a defendant

is recaptured before invoking the appellate process: Whatever the appellate court decides, its judgment will be fully enforceable. *Id.* at 1206. Likewise, in the present case, the enforceability concern is completely absent: Any judgment in this forfeiture action, whether for or against petitioner, would be "fully enforceable since the property is in the court's control." See *$40,877.59*, 32 F.3d at 1156; *Pole No. 3172*, 852 F.2d at 643.

The Court in *Ortega-Rodriguez* also reasoned that the interest in the "efficient operation" of the appellate process "will not be advanced by dismissal of appeals filed after former fugitives are recaptured." 113 S. Ct. at 1206. Any delay occasioned by the fugitive's escape, the Court explained, would affect proceedings only in the *district court*. This insistence that disentitlement be used to safeguard the integrity only of the *sanctioning court*'s own processes demonstrates why the doctrine has no place in civil forfeiture actions.[11] Petitioner's alleged fugitivity in the criminal case "does not threaten the integrity of the forfeiture proceeding," and his presence is not "needed to conduct an adversarial hearing [nor could it be] compelled in a civil action even if he were not a fugitive." *$40,877.59*, 32 F.3d at 1156; accord *Pole No. 3172*, 852 F.2d at 644.

2. Not only is the Ninth Circuit's holding inconsistent with *Sharpe* and *Ortega-Rodriguez*, but it runs afoul of the Due Process Clause of the Fifth Amendment, as well as various of this Court's due process cases. See U.S. Const. amend. V ("No person shall * * * be deprived of life, liberty, or property, without due process of law."). This Court has consistently held that due

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[11] Relatedly, *Ortega* held that the interest in protecting the "dignity" of the appellate court did not justify dismissal of the recaptured fugitive's appeal, because at most it was "the authority of the *District Court*, not the *Court of Appeals*," that the fugitive defendant might have "flouted." 113 S. Ct. at 1207 (emphasis added); see also *ibid.* (an appellate court may not "sanction by dismissal any conduct that exhibited disrespect for any aspect of the judicial system, even where such conduct has no connection to the course of appellate proceedings"). That consideration also weighs against use of disentitlement in civil forfeiture actions. See *$40,877.59*, 32 F.3d at 1156 ("the fugitive's disrespectful conduct is to another court in another action"); *Pole No. 3172*, 852 F.2d at 644.

process requires "some form of hearing * * * before an individual is finally deprived of a property interest" and that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976) (citation and internal quotation omitted). By operation of the fugitive disentitlement doctrine, however, petitioner has been deprived of all right to be heard in defense of his property.

The Ninth Circuit's holding is also at odds with this Court's recent decision in *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492, 498-505 (1993). In that case, the Court held that the Fifth Amendment's Due Process Clause confers on an owner of real property the right to a hearing before the property may be seized — even temporarily. The disentitlement doctrine works, if anything, a *more* severe due process violation than the violation identified in *Good*. As the Seventh Circuit has explained, in rejecting disentitlement in the forfeiture context, "[i]f a probable cause warrant, issued *ex parte*, is not sufficient to temporarily deprive an owner of the use of his property until a full hearing is held, then clearly it is an insufficient basis on which to justify a permanent loss by forfeiture." *$40,877.59*, 32 F.3d at 1155.[12]

The Ninth Circuit's decision also cannot be reconciled with a line of this Court's cases recognizing a fundamental *right to defend* rooted in the Due Process Clause. *McVeigh* v. *United States*, 78 U.S. (11 Wall.) 259 (1870); *Windsor* v. *McVeigh*, 93 U.S. 274 (1876); *Hovey* v. *Elliott*, 167 U.S. 409 (1897). As the Seventh Circuit correctly observed, these cases stand for the principle that "notwithstanding an individual's *status*, where he is vulnerable to being sued, he has the right to defend himself in the action brought against him; * * * the constitutional right to defend is inseparable

[12] In denying rehearing, the panel in this case made clear that "[i]f not for Brian's fugitive status, the rule of *Good* would apply to this case." App., *infra*, 39a. It held, however, that "the fugitive disentitlement doctrine precludes Brian" from asserting his rights under *Good* — effectively stripping him of his due process rights. *Ibid.*

from the liability to suit.'" *$40,877.59*, 32 F.3d at 1153 (emphasis added).[13]

Nor can petitioner be said to have "waived" his due process rights. Courts "do not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co.* v. *Public Util. Comm'n*, 301 U.S. 292, 307 (1937). Exactly the opposite is true: "in the civil no less than the criminal area, courts indulge every reasonable presumption *against* waiver." *Fuentes* v. *Shevin*, 407 U.S. 67, 94 n.31 (1972) (internal quotation omitted) (emphasis added). Moreover, "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady* v. *United States*, 397 U.S. 742, 748 (1970). Petitioner's actions (or, more accurately, his inaction) with regard to the *criminal* case simply cannot be construed as an intentional relinquishment of his due process rights in *this* case.

3. The Ninth Circuit's holding also violates the principle, established in a line of this Court's cases, that the federal courts' "inherent" or "supervisory" powers may not be employed in derogation of statutory or constitutional rights. *E.g.*, *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988); *Thomas* v. *Arn*, 474 U.S. 140, 148 (1985); *Societe Internationale* v. *Rogers*, 357 U.S. 197, 209 (1958). Applied in the context of a civil forfeiture action, the fugitive disentitlement doctrine — an equitable doctrine of appellate procedure developed by federal appellate courts in their supervisory capacity (*Goeke* v. *Branch*, 115 S. Ct. 1275 (1995) (per curiam); *Ortega-Rodriguez*, 113 S. Ct. at 1205)) — has precisely this forbidden effect. Rule C(6) of

[13] Thus, in *McVeigh* v. *United States*, the Court held that it was error, in a proceeding brought by the government to forfeit the property of a Confederate rebel actively engaged in the Civil War, to strike the rebel soldier's claim. Because the government was seeking to take the claimant's property, the Court explained, the claimant's "legal status" was irrelevant: "Whatever may be the extent of the disability of an alien enemy *to sue* in the courts of the hostile country, it is clear that he is liable to *be* sued, and this carries with it the right to use all the means and appliances of defence." 78 U.S. at 267 (emphases added; citation omitted).

the Supplemental Rules for Certain Admiralty and Maritime Claims confers on any "claimant of property that is the subject of an action in rem" the right to file a "claim" and "answer" to the government's forfeiture complaint. See App., *infra*, 40a. Similarly, the applicable forfeiture statute "does not authorize the forfeiture of property simply because the owner is a fugitive" (*$40,877.59*, 32 F.3d at 1155-56) but rather only upon enumerated grounds that have not been proven here. See 21 U.S.C. §§ 881(a)(6) & (7) (see App., *infra*, 40a). And, of course, the Fifth Amendment stands as a barrier to all governmental deprivations of property without due process of law. The "inherent" or "supervisory" power of the federal courts is not a license to nullify rights afforded by Congress or by the Constitution.[14]

4. This case provides a compelling illustration of the dangers of permitting the government to invoke disentitlement in the civil forfeiture context. *First*, petitioner's property was seized on the basis of only "minimal evidence that it was illegally used or obtained." *$40,877.59*, 32 F.3d at 1157. The government's conclusory complaint (ER 420-26) was supported by a single affidavit of a DEA agent (ER 472-94), which in turn consisted of hearsay and multiple hearsay from unnamed, confidential informants. See ER 472-94.[15] *Second*, the government's own submissions in the court below strongly suggest, if not conclusively establish, that this forfeiture action is barred by the applicable five-year statute of limitations (19 U.S.C. § 1621). This action was commenced in October of 1989. Yet the government conceded below that all but one of the Degens' parcels of real property named in the complaint (and alleged to be forfeitable because purchased with drug proceeds) were acquired by petitioner *before* 1981. U.S. Br. Appellee 23. In view of this dispositive defense and the extensive documentation submitted to the trial court by petitioner demonstrating his legitimate ownership of the subject property, the government would not prevail on the merits of this forfeiture action.[16]

Third, as was true of the disentitled property owner in the Seventh Circuit's decision in *$40,877.59*, petitioner's "fugitive status is questionable." 32 F.3d at 1156-57. Petitioner "has been indicted but not tried or convicted of any criminal charges." App., *infra*, 5a. It is undisputed that he departed the United States well before he was indicted, and the government has not shown (or been required to show) that he left with any intent to avoid prosecution. The Ninth Circuit concluded that petitioner is a

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[14] In previous cases, the Ninth Circuit opined that the fugitive disentitlement doctrine "should apply with greater force in civil cases where an individual's liberty is not at stake." *Conforte*, 692 F.2d at 589; *$129,374*, 769 F.2d at 588. This analysis overlooks two contrary principles: (1) the Due Process Clause protects against deprivations of property, not just of liberty; and (2) an appellate court's exercise of its supervisory power to dismiss a fugitive defendant's *criminal appeal* does not violate due process because "a convicted criminal has no constitutional right to an appeal." *Goeke*, 115 S. Ct. at 1277 (internal quotations omitted); *Estelle* v. *Dorrough*, 420 U.S. 534, 536-37 (1975). By contrast, taking a person's property without affording him any hearing clearly *does* implicate due process.

[15] More than a year after the trial court ordered petitioner's claims stricken, the government submitted three affidavits in support of its second motion for summary judgment against Karyn Degen. See ER 67-78 (Declarations of Michael McCreary, Catherine Bryant, and Ciro Mancuso); note 2, *supra*. Because those affidavits were not before the district court when it ruled on the government's motion to strike Brian Degen's claims, they obviously cannot be considered for the purpose of assessing the government's case against Brian. In any event, the affidavits are of exceedingly dubious value. See note 16, *infra*.

[16] As for the government's ability to prevail on the *criminal* charges against petitioner, suffice it to say that in the only case brought to trial against petitioner's numerous co-indictees, the government recently suffered a "stunning defeat" at the hands of a Nevada jury. 5 *The DOJ Alert* 14 (Apr. 3, 1995); see generally Howard Mintz, *Fort Reno's Obsession*, The American Lawyer 54-61 (May 1995). In acquitting Patrick Hallinan on all charges after only six hours of deliberations, see *S.F. Lawyer is Acquitted in Drug Ring Case*, Los Angeles Times, Mar. 8, 1995, at A3, the jury evidently rejected as incredible the central testimony of the government's star witness, Ciro Mancuso. See *Jury Acquits Hallinan of All Charges*, S.F. Chronicle, Mar. 8, 1995, at A1 ("Jury foreman John Tonner commented after the verdict that Mancuso 'would make a good used-car salesman. He lies a lot.'").

fugitive because he resides in a foreign country and has failed to return to the United States to face criminal charges that he learned of while living abroad. App., *infra*, 5a.

The Ninth Circuit's sweeping definition of fugitivity cannot be reconciled with the ordinary meaning of the word "fugitive" (which is derived from the verb "to flee")[17] or with the fact that disentitlement is a *sanction* imposed for some sort of *wrongful* conduct.[18] The Ninth Circuit's expansive definition, moreover, is symptomatic of the distortions that can arise when (as in the civil cases applying the disentitlement doctrine) the federal courts go about crafting a whole body of law pursuant to their "inherent" or "supervisory" powers. The Ninth Circuit's opinion is not an isolated example of this phenomenon; indeed, the disentitlement doctrine has spawned a vast array of case law, as courts struggle to mold and shape (out of whole cloth) the new federal common law of disentitlement. See, *e.g.*, *BCCI Holdings (Luxembourg), Society Anonyme* v. *Pharaon*, 1995 WL 231330, at *4 (S.D.N.Y. 1995) (in civil RICO action between private parties, disentitling fugitive defendant who "flouted the authority of other courts" from obtaining discovery but not from defending the lawsuit).

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[17] See *Webster's New World Dictionary of American English* 544 (3d College ed. 1989) (defining "fugitive" as "a person who flees or has fled from danger, justice, etc."); see also 18 U.S.C. § 921(a)(15) (defining term "fugitive from justice" for purposes of various federal firearms provisions as "any person who has *fled* from any State *to avoid prosecution for a crime* or to avoid giving testimony in any criminal proceeding") (emphasis added). Compare *$40,877.59*, 32 F.3d at 1156 ("[T]o be a fugitive, [a] defendant must flee the state with the intent to avoid prosecution.").

[18] In *Ortega-Rodriguez*, the Court made clear that disentitlement is a "*sanction* [in the form of] dismissal." 113 S. Ct. at 1207 (emphasis added). When applied in a civil forfeiture proceeding, that sanction is especially punitive in nature. See *Austin* v. *United States*, 113 S. Ct. 2801, 2810-12 (1993) (forfeiture pursuant to 21 U.S.C. § 881(a)(7) constitutes punishment sufficient to trigger Excessive Fines Clause). Thus, petitioner has not simply been *deprived of property*: He has been *assessed a multimillion-dollar punishment*.

The necessary consequence of the Ninth Circuit's holding is to free the government from virtually every restraint — whether based in the Constitution, the forfeiture statutes, or the procedural rules governing forfeiture actions — with respect to property owned by a claimant who is a "fugitive" (a term that itself knows almost no boundaries in the disentitlement context). The government may prevail on the basis of a facially defective complaint (see *Pole No. 3172*, 852 F.2d at 638-43) or on claims that are plainly time-barred (as here); may obtain the forfeiture of property that is beyond the district court's *in rem* jurisdiction (as was alleged in *Alvarez*); and may even succeed in confiscating property that it asserts (but could not prove) is related to the criminal proceeding from which the fugitive has absconded (*$40,877.59*, 32 F.3d at 1155).[19]

The government "already enjoys a tremendous procedural advantage under the forfeiture laws." *$40,877.59*, 32 F.3d at 1156. It need only show probable cause to believe that property was used to promote illegal activity; the claimant then bears the burden of proving that the property was not involved in any illegal activity. 19 U.S.C. § 1615. Not content with its existing advantage, however, the government now seeks to remove the only obstacle remaining in the path of its forfeiture juggernaut: the right of a property owner to his day in court to defend against an unlawful forfeiture. The Court should not permit this unwarranted expansion of the government's forfeiture power, particularly in

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[19] See *$40,877.59*, 32 F.3d at 1155-56 ("The forfeiture act * * * does not authorize the forfeiture of property simply because the owner is a fugitive, but by using a combination of the forfeiture laws and the fugitive disentitlement doctrine, the government is allowed to do just that."); *Pole No. 3172*, 852 F.2d at 643 ("We refuse to condone a rule that essentially allows the government to go through the missing persons list and seize all the property of everyone who fails to respond to a forfeiture complaint, without even showing the court that it reasonably believes the property is forfeitable as Congress intended it to do."); but cf. *Doyle* v. *United States Dep't of Justice*, 668 F.2d 1365, 1365 (D.C. Cir. 1981) (per curiam) (in upholding dismissal of fugitive's complaint under Freedom of Information Act, rejecting argument that "[o]nly Congress, not the judiciary, may establish exceptions to the Act's disclosure commands"), cert. denied, 455 U.S. 1002 (1982).

view of the government's "direct pecuniary interest in the outcome" of forfeiture proceedings. *Good*, 114 S. Ct. at 502 & n.2; see also *id.* at 515 (Thomas, J., concurring in part and dissenting in part) (expressing "distrust of the Government's aggressive use of broad civil forfeiture statutes").

C. The Issues Presented Are Important And Recurring.

This case raises vitally important issues of federal law. The disentitlement doctrine, as applied by the court below, poses fundamental constitutional questions regarding the government's authority to confiscate property without permitting the owner *any* opportunity to be heard. Equally significant is the related and squarely presented question whether the federal courts, pursuant to their "inherent" or "supervisory" authority, may nullify rights conferred by Congress and by the Constitution. And, of course, the case offers this Court an opportunity to provide much-needed guidance concerning the proper use, if any, of the disentitlement doctrine in civil actions.

These issues arise with considerable frequency. The fugitive disentitlement doctrine is routinely invoked in civil forfeiture actions, and the government has become increasingly emboldened by its successes to push the doctrine to new and more expansive limits.[20] There is, moreover, good reason to believe that the

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[20] See, *e.g.*, *United States* v. *Michelle's Lounge*, 39 F.3d 684 (7th Cir. 1994); *$40,877.59*, 32 F.3d 1151; *Timbers Preserve*, 999 F.2d 452; *United States* v. *Contents of Accounts Nos. 3034508504 and 144-07143 At Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 971 F.2d 974 (3d Cir. 1992); *Eng*, 951 F.2d 461, aff'g, 745 F. Supp. 118 (E.D.N.Y. 1990); *United States* v. *Twenty Cashier's Checks*, 897 F.2d 1567 (11th Cir. 1990); *7707 S.W. 74th Lane*, 868 F.2d 1214; *United States* v. *One Residential Property Located At 450 Ocean Drive, PH-3, Juno Beach, Fla.*, 1989 WL 140904 (9th Cir. 1989); *Pole No. 3172*, 852 F.2d 636; *$45,940*, 739 F.2d 792; *$83,320*, 682 F.2d 573; *United States* v. *$470,371.76 U.S. Currency, More or Less*, 1993 WL 88226 (S.D.N.Y. 1993); *United States* v. *All Monies in Account No. 400 6050975 00*, 1992 U.S. Dist. LEXIS 16930 (E.D. Pa. Nov. 4, 1992); *United States* v. *All Funds on Deposit in Any Accounts Maintained at Merrill Lynch, Pierce, Fenner & Smith*, 801 F. Supp. 984 (E.D.N.Y. 1992); *United States* v. *United States Currency in Amount of $294,600*, 1992 WL 170924 (E.D.N.Y. 1992); *United States* v. *One Parcel of Real Property Described as Lot 156 and the South Three Feet of Lot 157, Valley View Estates*, 776 F. Supp. 432 (W.D. Mo. 1991), aff'd in unpublished opinion, 1992 U.S. App. LEXIS 29278 (8th Cir. 1992) (per curiam); *United States* v. *$182,980.00 U.S. Currency*, 727 F. Supp. 1387 (D. Colo. 1990); *United States* v. *Certain Real Property Located at 760 S.W. 1st Street, Miami, Florida*, 702 F. Supp. 575 (W.D.N.C. 1989); *United States* v. *Collins*, 651 F. Supp. 1177 (S.D. Fla. 1987); *United States* v. *One Lot of U.S. Currency Totalling $506,537.00*, 628 F. Supp. 1473 (S.D. Fla. 1986).

doctrine is applied with far greater frequency than even the many reported forfeiture decisions would suggest, especially in those circuits (such as the Second, Ninth, and Eleventh) where this practice has long been approved. For example, in the decision that gave rise to the *Alvarez* petition, the Eleventh Circuit summarily affirmed a district court judgment striking the claims of various property owners on the strength of the fugitive disentitlement doctrine. *United States* v. *Certain Funds In The United Kingdom*, Nos. 92-2294, -2295, -2920, 93-2424 (11th Cir. Apr. 13, 1994) (per curiam), reprinted in Appendix to Pet. for Certiorari, *Alvarez* v. *United States*, No. 94-636. In another unreported decision, the Ninth Circuit similarly upheld a judgment of forfeiture of a home on the basis of the disentitlement doctrine. See *United States* v. *Real Property at 11205 McPherson Lane, Ojai, California*, 1994 U.S. App. LEXIS 20658 (9th Cir.), cert. dismissed, 115 S. Ct. 536 (1994) (Rule 46 dismissal). In addition, both the Seventh and the Tenth Circuits recently have issued unpublished decisions that turned on this issue. See note 5, *supra*; *United States* v. *Sanders*, 1995 U.S. App. LEXIS 3999, *4-*5 (8th Cir. Feb. 28, 1995). In short, the reported cases — which by themselves are quite substantial — understate the true incidence of this questionable use of disentitlement.

The Court's resolution of the issues presented in this case will also shed light on the propriety of using the disentitlement doctrine in other civil contexts. The disentitlement doctrine has been invoked in a wide array of civil contexts, including in other

settings where property is temporarily restrained,[21] in civil rights actions under 42 U.S.C. § 1983,[22] in deficiency and other actions under the tax laws,[23] in immigration cases,[24] and in a variety of other cases.[25] See generally *In re Prevot*, 1995 U.S. App.

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[21] See, *e.g.*, *In re Assets of Martin*, 1 F.3d 1351 (3d Cir. 1993) (dismissing fugitive's appeal from restraining order to preserve availability of assets granted pursuant to RICO, 18 U.S.C. § 1963(d)(1)); *United States* v. *Eagleson*, 874 F. Supp. 27 (D. Mass. 1994) (applying disentitlement doctrine to prevent hearing on the merits of RICO restraining order).

[22] See, *e.g.*, *Perko* v. *Bowers*, 945 F.2d 1038 (8th Cir.), cert. denied, 503 U.S. 939 (1992); *Ali* v. *Sims*, 788 F.2d 954 (3d Cir. 1986); *Broadway* v. *City of Montgomery*, 530 F.2d 657 (5th Cir. 1976); *Andra* v. *Erickson*, 1995 U.S. Dist. LEXIS 8555 (D. Mont. May 31, 1995); *Griffin* v. *City of New York Correctional Com'r*, 882 F. Supp. 295 (E.D.N.Y. 1995); *Mayberry* v. *Robinson*, 427 F. Supp. 297 (M.D. Pa. 1977); *Siebert* v. *Johnston*, 381 F. Supp. 277 (E.D. Okl. 1974).

[23] See, *e.g.*, *Friko Corp.* v. *Commissioner of Internal Revenue*, 26 F.3d 1139 (D.C. Cir. 1994); *Schuster* v. *United States*, 765 F.2d 1047 (11th Cir. 1985); *Conforte* v. *Commissioner*, 692 F.2d 587 (9th Cir. 1982); *Pecoraro* v. *C.I.R.*, 1995 WL 311334 (T.C. 1995); *Daccarett-Ghia* v. *C.I.R.*, 1994 WL 675537 (T.C. 1994); *Edelman* v. *C.I.R.*, 103 T.C. 705 (T.C. 1994); *Coninck* v. *C.I.R.*, 100 T.C. 495 (T.C. 1993); *Gruevski* v. *C.I.R.*, 59 T.C.M. (CCH) 842 (T.C. 1990); *Smith* v. *C.I.R.*, 57 T.C.M. (CCH) 864 (T.C. 1989); *Berkery* v. *C.I.R.*, 90 T.C. 259 (T.C. 1988).

[24] See, *e.g.*, *Bar-Levy* v. *United States Dep't of Justice, I.N.S.*, 990 F.2d 33 (2d Cir. 1993); *Arana* v. *United States Immigration & Naturalization Serv.*, 673 F.2d 75 (3d Cir. 1982) (per curiam); *Singh* v. *Schiltgen*, 1995 WL 311966 (N.D. Cal. 1995); *Singh* v. *Reno*, 1994 WL 721469 (N.D. Cal. 1994).

[25] See, *e.g.*, *Aamco Transmissions, Inc.* v. *Martin*, 647 F.2d 164, 164 (6th Cir. 1981) (dismissing fugitive's appeal from judgment in civil action ordering specific performance of settlement agreement); *United Elec., Radio and Mach. Workers of America* v. *163 Pleasant Street Corp.*, 960 F.2d 1080, 1097 (1st Cir. 1992) (appeal from grant of preliminary injunction under ERISA); *Doyle* v. *United States Dep't of Justice*, 668

LEXIS 17014, at *17-26 (6th Cir. July 14, 1995) (collecting cases). With increasing frequency, private litigants are attempting to follow the government's example by using the disentitlement doctrine against their absent opponents. See, *e.g.*, *Pharaon*, 1995 WL 231330 (disentitling fugitive from defending against civil RICO claim).

The issue is ripe for this Court's review. Indeed, the courts of appeals have suggested, more than once, the need for guidance from this Court. See, *Perko* 945 F.2d at 1039 ("Supreme Court has yet to define the reach of the [fugitive disentitlement] rule outside" of criminal appeals); *$40,877.59*, 32 F.3d at 1153 ("Supreme Court has not reviewed any case in which the doctrine was used by a district court in a civil forfeiture proceeding"). Further review is warranted.[26]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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F.2d 1365, 1365 (D.C. Cir. 1981) (per curiam) (action under Freedom of Information Act), cert. denied, 455 U.S. 1002 (1982).

[26] The importance of this Court's guidance in this area, moreover, extends to state cases as well. See, *e.g.*, *State of Maryland Deposit Insurance Fund Corp.* v. *Billman*, 321 Md. 3, 580 A.2d 1044, 1046-49 (1990) (discussing federal disentitlement cases and collecting state cases applying doctrine); *Garcia* v. *Metro-Dade Police Dep't*, 576 So.2d 751, 752 (Fla. App. 1991) (citing federal authority in holding that claimant to property in civil forfeiture proceeding may be disentitled). See also note 7, *supra*.

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	)	
v.	)	
	)	No. 93-16996
REAL PROPERTY LOCATED AT INCLINE VILLAGE, et al., *Defendants*,	)	D.C. No. CV-90-00130-ECR
BRIAN J. DEGEN and KARYN DEGEN, *Claimants-Appellants*.	)	

Appeal from the United States District Court
for the District of Nevada
Edward C. Reed, Jr., District Judge.

Argued and Submitted
December 16, 1994 — San Francisco, California

February 10, 1995, Filed
Amended May 5, 1995

Before: Joseph T. Sneed, William A. Norris,
and Cynthia Holcomb Hall, Circuit Judges.

AMENDED OPINION

HALL, Circuit Judge:

Brian and Karyn Degen appeal from judgments entered against them in the district court on their claims to the defendant properties in this civil forfeiture action. The district court held in a published opinion that Brian Degen (hereinafter referred to as "Brian") was "disentitled" from pursuing his claim to the defendant properties

under the fugitive disentitlement doctrine. *See, e.g., United States v. $129,374 in United States Currency*, 769 F.2d 452 (9th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986). Two and one-half years later, the district court entered judgment against Karyn Degen ("Karyn") pursuant to Local Rule 140-6 of the District of Nevada, which provides in part that the failure of a party to file an opposition to a motion "shall constitute a consent to the granting of the motion." The district court entered judgment under this rule when Karyn failed to file a response to the government's summary judgment motion against her, despite receiving several extensions of time and being warned that the court intended to invoke Local Rule 140-6.

We have jurisdiction under 28 U.S.C. § 1291 and now affirm as to both appellants.

FACTS AND PROCEDURAL HISTORY

This civil forfeiture action under 21 U.S.C. §§ 881(a)(6) & (7) involves several million dollars worth of real and personal property, bank accounts, property income, and business interests located in California, Nevada, and Hawaii. The government initiated forfeiture proceedings against a wide array of property in 1989; after the Degens filed claims to a substantial portion of the property, the government severed those properties and made them the subject a second complaint. The complaint alleges that all the defendant properties were the fruits of and/or used to facilitate a massive marijuana trafficking operation Brian had participated in for over twenty years, beginning in the late 1960s. In a separate proceeding, a grand jury in the District of Nevada indicted Brian on a wide array of criminal charges relating to the alleged marijuana smuggling and related money laundering activities.

Brian is a Swiss citizen. Shortly before being indicted, he left the United States and resettled with his family in Switzerland. Under the extradition treaty between Switzerland and the United States, neither country is obligated to extradite its own nationals, so the United States government has been unable to secure his return to this country to face the criminal charges in Nevada. Brian refused to return voluntarily to the United States when he learned of the criminal charges against him. He was apparently arrested in Switzerland in late 1992, although the nature and

during the five years since his indictment made a good faith attempt to submit to the criminal jurisdiction of the Nevada district court.

The government first moved for summary judgment in May 1990. The district court granted the motion with respect to Brian, holding that he was a fugitive from justice in the related criminal case and therefore was not entitled to contest the civil forfeiture action. The court denied the first motion against Karyn, finding that she had raised triable issues of fact with respect to her innocent owner defense.

The government moved again for summary judgment in December 1992, against Karyn only. The second motion was supported by affidavits of three of Brian's alleged partners in his drug smuggling business, detailing their illegal activities and the sizeable amounts of money Brian earned therefrom over the years. The affiants also alleged that Brian had no significant income from legitimate sources during the long period covered by the criminal indictment. The motion was further supported by documentary evidence and an accompanying authenticating affidavit by the Assistant United States Attorney handling the case.

Under Local Rule 140-4, Karyn initially had fifteen days in which to respond to the summary judgment motion. She obtained numerous extensions of this deadline, claiming that sealing orders obtained by the government made it impossible to gather evidence in support of her claims. After a hearing in February 1993, the district court made all relevant documents available to Karyn to use in preparing her response to the motion, and reopened discovery for sixty days. When Karyn failed to file a response to the summary judgment motion before a final deadline imposed by the district court had passed, the court entered judgment against her pursuant to Local Rule 140-6.

I.

The disentitlement doctrine provides that a fugitive from justice under certain circumstances loses the right to call upon the resources of the courts. In a leading Supreme Court case on the subject, for example, a criminal defendant fled after being convicted and the Court held that his escape "disentitle[d him] to call upon the resources of the Court for determination of his" direct appeal. *Molinaro v. New Jersey*, 396 U.S. 365, 366, 24 L. Ed. 2d 586, 90

S. Ct. 498 (1970); *compare Ortega-Rodriguez v. United States*, 122 L. Ed. 2d 581, 113 S. Ct. 1199, 1209 (1993) ("[W]hen a defendant's flight and recapture occur before appeal, the defendant's former fugitive status may well lack the kind of connection to the appellate process that would justify an appellate sanction of dismissal.").

The disentitlement doctrine applies in more contexts than just direct criminal appeals. The circuit courts have extended the doctrine to disentitle fugitives from participating in civil proceedings related to the criminal cases they have fled. *See, e.g., Conforte v. Commissioner of Internal Revenue*, 692 F.2d 587 (9th Cir. 1982) (taxpayer who fled after conviction on criminal tax evasion charges not entitled to prosecute appeal of tax court determination of tax deficiencies and penalties), *stay denied*, 459 U.S. 1309, 103 S. Ct. 663, 74 L. Ed. 2d 588 (1983) (Rehnquist, J., in chambers); *Doyle v. United States Dep't of Justice*, 668 F.2d 1365 (D.C. Cir. 1981) (fugitive not entitled to seek judicial relief under Freedom of Information Act), *cert. denied*, 455 U.S. 1002, 71 L. Ed. 2d 870, 102 S. Ct. 1636 (1982); *Broadway v. City of Montgomery*, 530 F.2d 657 (5th Cir. 1976) (court of appeals refused to decide appeal of fugitive seeking damages and injunctive relief for illegal wiretap). More specifically, the disentitlement doctrine has been applied on a regular basis by this court and other circuits in the context of civil forfeiture claims. *See, e.g., $129,374*, 769 F.2d at 587; *United States v. Timbers Preserve, Routt County, Colorado*, 999 F.2d 452 (10th Cir. 1993); *United States v. Eng*, 951 F.2d 461 (2nd Cir. 1991); *United States v. One Parcel of Real Estate at 7707 S.W. 74th Lane, Miami, Dade County, Florida*, 868 F.2d 1214 (11th Cir. 1989); *United States v. Pole No. 3172, Hopkinton*, 852 F.2d 636 (1st Cir. 1988).

This court left open in *$129,374* the question whether the forfeiture action must be "directly related" to the criminal proceeding from which the claimant has fled, finding it unnecessary to resolve the issue because the "criminal conviction and the property involved in this civil forfeiture proceeding are integrally related parts of the same unlawful drug dealing scheme." 769 F.2d at 588. We need not decide that question either, for the same reason. The government submitted evidence in the present case to establish that all of the properties it seeks to seize were used in connection

with or purchased with the proceeds of the various illegal drug transactions which form the basis of Brian's criminal indictment. In addition, the government's "star witness" in the forfeiture case, Ciro Mancuso, and possibly other witnesses, are co-defendants in the criminal case. Under these circumstances, the criminal and forfeiture actions are closely enough connected to satisfy any relatedness test.

The present case differs from prior Ninth Circuit applications of the disentitlement doctrine in one respect. In prior cases, the claimants have fled after being convicted in a related criminal proceeding. *See, e.g., $129,374*, 769 F.2d at 584; *Conforte*, 692 F.2d at 589. Here, by contrast, Brian has been indicted but not tried or convicted of any criminal charges. This distinction does not, however, compel a finding that the fugitive disentitlement doctrine does not apply. The doctrine rests on the premise that "'the fugitive from justice has demonstrated such disrespect for the legal processes that he has no right to call upon the court to adjudicate his claim.'" *Ortega-Rodriguez*, 113 S. Ct. at 1206 (quoting *Ali v. Sims*, 788 F.2d 954, 959 (3d Cir. 1986)). Although Brian has not been arrested or tried, he has certainly "demonstrated disrespect" for the district court by refusing to submit to its jurisdiction in the criminal action.

The district court correctly concluded in its opinion dismissing Brian's claims in December 1990 that he was at that time a fugitive from justice because he knew he had been indicted in Nevada but refused to return. 755 F. Supp. at 309-10 (citing *United States v. Ballesteros-Cordova*, 586 F.2d 1321, 1323 (9th Cir. 1978) and *United States v. Gonsalves*, 675 F.2d 1050, 1052 (9th Cir.), *cert. denied*, 459 U.S. 837, 74 L. Ed. 2d 78, 103 S. Ct. 83 (1982)). At that time he was apparently free to return to the United States to contest the forfeiture action, but chose not to do so, presumably to avoid arrest on the criminal charges. Under these circumstances, Brian was a fugitive. See *$129,374*, 769 F.2d at 587-88 ("It is important to recognize that Lewis has complete control over the protection of his property interests in this forfeiture proceeding; if he finds his interests are sufficiently worth defending, he can terminate his fugitive status and present his own defense."); *Gonsalves*, 675 F.2d at 1055 (fugitive status continues until accused makes a "good faith effort to surrender").

Brian was apparently arrested by Swiss authorities on November 19, 1992. His counsel strenuously argued in the district court and again in this court that the Swiss arrested Brian at the behest of the United States government, which wished to "transfer" its prosecution to Switzerland because extradition was impossible. While counsel argues this point, however, the record contains no admissible *evidence* to support these claims.

The only document submitted to the district court that even arguably tended to prove that Brian was arrested in Switzerland was an affidavit of the Degens' counsel, submitted by Karyn Degen in support of a request for an extension of time to respond to the second summary judgment motion. The affidavit, however, consists of hearsay, multiple hearsay, and virtually no factual statements based on personal knowledge.

The only other purported *evidence* of United States involvement in Brian's arrest in Switzerland are two letters from the Department of Justice Office of International Affairs to Swiss authorities, supposedly proving that the United States government was "transferring" its prosecution of Brian to Switzerland. There are numerous obstacles to Brian's attempt to use these letters as evidence of improper activity by the government. To begin with, the letters are unauthenticated and, so far as we can discern, are hearsay not subject to any exception. Furthermore, the letters were never submitted to the district court and constitute an inappropriate attempt to supplement the factual record on appeal.[1]

Even putting these problems aside, Brian has never proffered any supporting evidence or argument explaining the import of the letters. For example, despite being in contact with Brian's Swiss local counsel and possibly with Brian himself, Brian's counsel in this case has apparently failed to obtain a copy of the Swiss charges against Brian in the two years since the arrest in Switzerland. Without even that basic piece of information, any conclusion as to whether the Swiss prosecution was a "transfer" of the Nevada charges would be sheer speculation. Brian has also submitted no

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[1] Just prior to oral argument, the Degens made a formal motion to supplement the record on appeal with these letters. We denied the motion. The present discussion is intended in part to explain that ruling.

legal authority explaining how the purported "transfer" of prosecutions from the United States to Switzerland was effected. Our research reveals no treaty between the United States and Switzerland which authorizes such transfers of prosecution; other bilateral treaties to which the United States is a party, however, do explicitly provide such a mechanism. *See, e.g.*, Treaty on Extradition, U.S.-Denmark, June 22, 1972, art. 5, 25 U.S.T. 1293 (if the requested state declines to extradite its own national, "the requested State shall submit the case to its competent authorities for the purpose of prosecution"); Extradition Treaty, U.S.-Finland, June 11, 1976, art. 4(2), 31 U.S.T. 944 (same); Treaty of Extradition, U.S.-Netherlands, June 24, 1980, art. 4(3), T.I.A.S. 10733 ("If extradition is not granted solely on the basis of the nationality of the person sought, the Requested State shall, at the request of the Requesting State, submit the case to its competent authorities for the purpose of prosecution, provided that the offense constitutes a criminal offense under the law of that State and that State has jurisdiction over the offense.").

All in all, we find that there is no credible evidence properly in the record before us to support Brian's allegations of government involvement in his arrest and prosecution in Switzerland. Furthermore, there is language in several cases suggesting that the fact that a fugitive is incarcerated in a foreign jurisdiction does not preclude application of the fugitive disentitlement doctrine. *See, e.g.*, *Timbers Preserve*, 999 F.2d at 456 ("Regardless of the reasons for Pietri's incarceration in Laos, he was a fugitive from this country when he left and remained a fugitive until he was returned, even though he may have lost control of his own freedom in Laos."); *Eng*, 951 F.2d at 464 ("One may flee though confined in prison in another jurisdiction."); *United States v. Catino*, 735 F.2d 718, 722 (2nd Cir.) (noting that "a fugitive who is imprisoned in a foreign jurisdiction and then resists his return to the United States may *remain* a 'person fleeing from justice'") (citation omitted), *cert. denied*, 469 U.S. 855, 83 L. Ed. 2d 114, 105 S. Ct. 180 (1984). Even assuming the situation would be different if Brian could prove that the United States government was somehow involved in his arrest in Switzerland, we find that he has not so proven.

The district court erred in one respect in its 1990 opinion. The district court found that upon finding that Brian was a fugitive

from justice, this court's decision in *$129,374* allowed for no discretion in the application of the disentitlement doctrine. As a result, the court did not consider whether the doctrine should, in the exercise of its discretion, be applied. Subsequent decisions, however, have made clear that the doctrine is discretionary, not mandatory. *See, e.g., Ortega-Rodriguez*, 113 S. Ct. at 1209 n.23 ("dismissal of fugitive appeals is always discretionary, in the sense that fugitivity does not 'strip the case of its character as an adjudicable case or controversy'") (quoting *Molinaro*, 396 U.S. at 366); *United States v. Van Cauwenberghe*, 934 F.2d 1048, 1055 (9th Cir. 1991) ("while we clearly have the discretionary authority to dismiss this appeal, there is 'no *per se* requirement of dismissal in [these] . . . case[s]'" (quoting *Hussein v. INS*, 817 F.2d 63, 63 (9th Cir. 1986) (Norris, J., concurring))).

Brian does not, however, argue this issue on appeal. We therefore deem it to be waived. We thus hold that the district court properly dismissed Brian's claims to the defendant properties under the fugitive disentitlement doctrine.[2]

II.

Karyn argues that the district court erred in entering summary judgment against her under Local Rule 140-6. She contends that genuine issues of material fact exist as to her innocent owner defense to the forfeiture action, and that she was unable to prepare a response to the government's second summary judgment motion due to the sealing of various documents and the inability of certain witnesses to testify in depositions about matters also under seal. We find, however, that the district court properly exercised its

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[2] While this appeal was pending, the Supreme Court decided *United States v. James Daniel Good Real Property*, 126 L. Ed. 2d 490, 114 S. Ct. 492 (1993), which held that seizure of real property for forfeiture without prior notice and a hearing violates the owner's due process rights under the Fifth Amendment. If not for Brian's fugitive status, the rule of *Good* would apply to this case. *See United States v. Real Property Located at 20832 Big Rock Drive*, No. 93-55281, slip op. 3843, 1995 WL 150859 (9th Cir. Apr. 7, 1995). However, the fugitive disentitlement doctrine precludes Brian from contesting the government's seizure of his properties.

discretion in granting the government's second summary judgment motion.

A. *Procedural Background*

The government filed its second summary judgment motion on December 2, 1992. District court Local Rule 140-6 provides that "[t]he failure of an opposing party to file a memorandum of points and authorities in opposition to any motion shall constitute a consent to the granting of the motion." Under Local Rule 140-4, a party normally has fifteen days in which to respond to any motion. The government initially agreed to a fifteen-day extension of that deadline. Karyn did not, however, adhere to that timetable.

On January 5, 1993, several days after the first extended deadline passed, Karyn moved for an extension of time to reply. Karyn argued that the sealing of several documents, including affidavits supporting the government's summary judgment motion, made it impossible to defend the motion. She also complained that she was unable to respond to the motion because the assistance of Brian Degen was essential and he had been arrested by Swiss authorities, allegedly at the behest of the United States government, and was being held "incommunicado."

In response to this motion, the district court held a hearing. At the close of the hearing, the court found that two of the government's affidavits supporting its motion should not have been sealed and ordered them made available to Karyn. A third affidavit, that of Ciro Mancuso, was ordered sealed but made available to Karyn and her counsel to prepare their response to the motion. The court also reopened discovery for sixty days and allowed Karyn until twenty days after the new close of discovery to respond to the summary judgment motion.

When Karyn failed to respond to the motion by the new deadline, the district court, on May 3, sua sponte granted an additional two week extension. The court warned, however, that if Karyn failed to respond by May 17, "said motion will be forthwith granted." Rather than comply, however, Karyn on May 5 filed a Motion for Order Staying Further Proceedings in This Case Pending Resolution of Related Criminal Actions. On May 19, the government filed an opposition to Karyn's request for a stay,

and a request for judgment in accordance with the May 3 Minute Order.

On June 2, the district court denied Karyn's motion for a stay and granted an additional twenty days in which to respond to the summary judgment motion. The court again explicitly warned Karyn that it would enter summary judgment against her if she failed to respond:

> [Karyn] has failed to respond [to the summary judgment motion] within the time period required by the rules. However, rather than to default [her] at this time, the Court will grant an additional period of twenty (20) days to respond to the motion for summary judgment. If [Karyn] fails to respond to said motion within 20 days summary judgment will be entered. [Karyn] has been allowed ample time to file a response to this motion.

When Karyn failed to file any response or other motion, the district court entered summary judgment against Karyn in an order dated June 23, 1993.

B. *Discussion*

Federal Rule of Civil Procedure 83 permits the district courts to promulgate local rules governing practice and procedure, so long as the rules do not conflict with the Federal Rules. In appeals from grants of default summary judgment, this court has upheld two Arizona district local rules which are substantially identical to Nevada Local Rule 140-6. *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 949-50 (9th Cir. 1993) (upholding Local Rule 11(i) of the District of Arizona, providing that failure to serve and file answering memoranda "may be deemed a consent to the denial or granting of the motion summarily"); *United States v. Warren*, 601 F.2d 471, 473 n.1 (9th Cir. 1979) (upholding Arizona Local Rule 11(g), providing that "[a] failure to file a brief or memorandum of points and authorities in support of or in opposition to any motion shall constitute a consent of the party failing to file such a brief or memorandum to the denial or granting of the motion.").

In *Henry*, we noted that the "interrelationship between Rule 56 and Rule 83" requires that the local rule leave a measure of discretion in the hands of the district court. 983 F.2d at 949-50. Because summary judgment is only proper under Rule 56 if there

is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, a local rule cannot mandate automatic entry of judgment for the moving party without consideration of whether the motion and supporting papers satisfy the requirements of Rule 56. *Id.* at 950. *Henry* and *Warren*, 601 F.2d at 473, both held that the Arizona rules phrased similarly to Nevada Local Rule 140-6 permitted sufficient discretion.

Local Rule 140-6 provides that failure to file an opposition to a motion "shall constitute a consent to the granting of the motion." While the rule allows no discretion in finding that *consent* has been given, it does not remove the district court's discretion as to whether to *grant* the motion. As this court observed in *Warren*, "'[c]onsent' when imposed by rules such as 11(g) can be 'withdrawn' by 'permission' of the court given in its 'discretion.' That is, fictional 'consent' under Rule 11(g) is never a burden from which the transgressor can not be relieved." 601 F.2d at 473.

Local Rule 140-6 allows the same discretion approved in *Warren*, so that the district court retains the power *not* to grant judgment despite a violation of the rule, if the underlying motion is deficient. We therefore hold that the rule is facially valid.

The district court's grant of summary judgment against Karyn would consequently be permissible so long as the government's motion satisfied Rule 56, and we find that it did. Civil forfeiture actions under 21 U.S.C. §§ 881(a)(6) & (7) are in rem proceedings in which the property seized is the defendant. *United States v. One 1985 Mercedes*, 917 F.2d 415, 419 (9th Cir. 1990). The government bears the initial burden of showing probable cause that the property seized is the proceeds of a federal narcotics violation or was used to commit or facilitate such a violation. *Id.* Although the government must show "more than mere suspicion," establishing probable cause is not a heavy burden, requiring only that the government "demonstrate by some *credible evidence* the probability that the [property] was in fact" drug-related. *United States v. Dickerson*, 873 F.2d 1181, 1184 (9th Cir. 1988) (emphasis in original); *see also United States v. $5,644,540.00 in U.S. Currency*, 799 F.2d 1357, 1362 (9th Cir. 1986) (government must support seizure with "less than prima facie proof but more than mere suspicion"); *United States v. One 56-Foot Motor Yacht Named the Tahuna*, 702 F.2d 1276, 1281 (9th Cir. 1983) (standard of probable

cause is "similar to that required to obtain a search warrant"). Once the government succeeds in establishing probable cause, the burden of proof shifts to the claimant to show by a preponderance of the evidence that the property is not forfeitable. *United States v. $215,300 U.S. Currency*, 882 F.2d 417, 419 (9th Cir. 1989), *cert. denied*, 497 U.S. 1005 (1990).

The government submitted all new evidence in support of its second summary judgment motion. The affidavits supporting the second motion consist of statements by Brian Degen's "smuggling partners" which, if believed, establish that Brian earned enormous amounts of money from illegal narcotics trafficking and had virtually no legitimate income.[3] This evidence suffices to establish probable cause that all of the properties seized were purchased with the proceeds of, or used to facilitate, illegal transactions.

In response to the first summary judgment motion, the Degens submitted evidence intended to establish that some of the defendant properties were not forfeitable in their entirety because they had been purchased in part with Karyn's separate property. Without expressing any opinion as to whether the district court properly ruled that this evidence raised a genuine issue of fact with respect to Karyn's claims at the time of the first motion, we find the evidence irrelevant to our review of the district court's Local Rule 140-6 decision of the second motion.

Under *Henry*, default summary judgment is proper unless "the *movant's papers are themselves insufficient* to support a motion for summary judgment or *on their face* reveal a genuine issue of material fact." 983 F.2d at 949 (emphasis added). We recently reaffirmed that the facial sufficiency of the moving party's papers is a paramount consideration whenever a district court contemplates

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[3] The Degens claim that the government's affidavits in support of the motion were defective. This contention is meritless. The declarations all appear to be based on personal knowledge, relating events which the declarants witnessed or were told by Brian in the course of their smuggling and financial dealings. Certainly, the Degens might have been able to attack the declarants' credibility had the case gone to trial, but such impeachment would affect the weight of the evidence, not its admissibility, and is immaterial for summary judgment purposes.

entering a default summary judgment. *Marshall v. Gates*, 44 F.3d 722 (9th Cir. 1995). In *Marshall*, we held that the district court improperly granted summary judgment in favor of the defendants when the plaintiffs filed and served their response to the motion after the deadline imposed by a local rule of court. *Id.* at 725. We held that the district court could not enter judgment without considering the sufficiency of the moving party's papers and, in fact, that the defendant's papers were in that case insufficient on their face to sustain the summary judgment. *Id.*

Here, unlike in *Marshall*, the government's papers were sufficient and on their face revealed no factual issue. Karyn might possibly have averted summary judgment simply by resubmitting the same evidence she offered in response to the first motion. She did not do so, however, and therefore cannot complain that the evidence was not considered when she defaulted. While Karyn was under no obligation to submit evidence in opposition to the motion, the government was entitled to summary judgment on the basis of its undisputed evidence.

We review the district court's decision to grant judgment for violation of Local Rule 140-6 for abuse of discretion. *See Warren*, 601 F.2d at 474 ("Only in rare cases will we question the exercise of discretion in connection with the application of local rules."); *Carey v. King*, 856 F.2d 1439, 1440 (9th Cir. 1988) (reviewing local rule allowing dismissal for failure to prosecute); *Miranda v. Southern Pacific Transp. Co.*, 710 F.2d 516, 521 (9th Cir. 1983) ("District courts have broad discretion in interpreting and applying their local rules."). The district court did not abuse its discretion in this case. Karyn was allowed a total of over six months to respond to the government's summary judgment motion. Even assuming that the early delays were necessary because various documents were sealed due to the related criminal prosecution, that was no longer the case after the district court's February order reopening discovery and making all documents available to Karyn.

Karyn had the opportunity to depose all witnesses whose affidavits the government submitted in support of its motion.[4] We

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[4] Karyn argues that she was unable fully to depose certain witnesses because they refused to answer questions regarding their sealed plea

also find little merit in her contention that she was prejudiced by the district court's conditioning her right to submit a declaration by Brian Degen on a showing that he was unavailable for a deposition. Karyn did not and still does not explain how it would have been possible to obtain a sworn affidavit from Brian, who was allegedly being held "incommunicado" in a Swiss prison at that time, whereas a deposition would have been impossible. Furthermore, she made absolutely no attempt to present any such declaration to the district court or to show that Brian was in fact unavailable for a deposition.

The district court specifically warned Karyn at least twice that it would enter judgment under Local Rule 140-6 if she failed to respond. The court sua sponte granted an additional extension. Under these circumstances, granting the government's motion was not an abuse of discretion.[5] *See, e.g., Henderson*, 779 F.2d at

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agreements in related criminal cases. Therefore, she claims, she was unable to elicit testimony showing the witnesses' bias. This claim, however, is irrelevant: on a motion for summary judgment, the district court would not have considered the credibility of the declarants supporting and opposing the motion. *See, e.g., National Union Fire Ins. Co. of Pittsburgh v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983) ("neither a desire to cross-examine an affiant nor an unspecified hope of undermining his or her credibility suffices to avert summary judgment") (citations omitted). Thus, Karyn's inability to examine the declarants for bias was in no way prejudicial.

[5] Karyn further contends that the district court erred by not granting her motion for a stay pending completion of the related criminal proceedings, when no further sealing orders would be necessary. The decision to grant a continuance is committed to the discretion of the trial judge. *See Ungar v. Sarafite*, 376 U.S. 575, 589, 11 L. Ed. 2d 921, 84 S. Ct. 841 (1964); *Mesa Verde Const. Co. v. Northern Cal. Dist. Council of Laborers*, 820 F.2d 1006, 1011 (9th Cir. 1987) (no abuse of discretion in denying motion for further discovery when party had access to relevant documents during four week discovery extension and failed to make formal motion for further extension under Fed. R. Civ. Pro. 56(f)), *vacated on other grounds*, 861 F.2d 1124 (9th Cir. 1988) (en banc); *United States v. 2.61 Acres of Land, More or Less*, 791 F.2d 666, 670 (9th Cir. 1986) (denial of continuance will not be overturned unless arbitrary or unreasonable).

1423-25 (no abuse of discretion in dismissing complaint where district court had granted four continuances and warned plaintiff three times of possibility of dismissal as sanction for failure to file proposed pretrial order).

III.

Shortly before oral argument in this case, the Degens filed a document entitled "Motion to Remand with Instructions to Dismiss with Prejudice." The gist of the motion, which in reality raised a new issue on appeal which had not previously been briefed by the parties, is that this civil forfeiture case must be dismissed on double jeopardy grounds. We find this argument to be utterly without merit.

The Degens rely on the recent decision by a panel of this court in *United States v. $405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), which holds that civil forfeiture constitutes punishment for double jeopardy purposes and, therefore, the Fifth Amendment's Double Jeopardy Clause precludes the government from bringing a civil forfeiture action based on conduct for which the claimant has already been criminally prosecuted. Although *$405,089.23* may turn out to have far-reaching implications for civil forfeiture actions, it has no effect in the present case.

The motion purports to be on behalf of both appellants. So far as Karyn Degen is concerned, the suggestion that she has been placed in double jeopardy comes dangerously close to being frivolous. It requires no probing analysis to conclude that one's right to be free from *double* jeopardy cannot be violated by being placed only *once* in jeopardy. Unlike her husband, Karyn has not been indicted, much less tried or convicted, of any criminal charges related

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When the district court denied the stay, this case had been pending for five years and Karyn had over six months to respond to the second summary judgment motion, including a sixty-day reopened discovery period. Furthermore, the request for an indefinite stay pending completion of the criminal proceedings seems somewhat disingenuous, since there is no prospect that the criminal proceedings will be concluded so long as Karyn's husband remains a fugitive. Under these circumstances, denial of the request for a stay was not an abuse of discretion.

to this forfeiture action. Karyn therefore has no plausible argument that she is entitled to relief under the Double Jeopardy Clause.

Brian's double jeopardy claim is almost as weak. He has been indicted in the District of Nevada on drug trafficking and money laundering charges related to the present forfeiture action. He has not, however, been arrested or tried. It is well-settled that jeopardy does not attach until the beginning of a criminal trial. *See, e.g., Crist v. Bretz*, 437 U.S. 28, 37-38 n.15, 57 L. Ed. 2d 24, 98 S. Ct. 2156-38 (1978) (jeopardy attaches when jury is empaneled and sworn or, in a bench trial, when the first witness is sworn). Thus, there is no jeopardy in the criminal action and this forfeiture case represents at best the "first" jeopardy. We reject as well any suggestion that the Swiss prosecution of Brian enters into the double jeopardy calculus, since Switzerland is without a doubt a separate sovereign for double jeopardy purposes.

IV.

The judgments of the district court against both Brian and Karyn Degen are

AFFIRMED.

APPENDIX B

UNITED STATES of America, Plaintiff,

v.

REAL PROPERTY LOCATED AT INCLINE VILLAGE, et al., Defendants.

No. CV-N-90-130-ECR

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

December 31, 1990, Decided
January 4, 1991, Entered

ORDER

EDWARD C. REED, JR., Chief Judge

On October 24, 1989, a federal grand jury in Nevada returned an indictment against Brian J. Degen, charging him in various counts of *United States v. Ciro Wayne Mancuso, et al.*, CR-N-89-24-ECR. A warrant was issued for Degen's arrest. On the same day, plaintiff instituted a civil forfeiture action against certain real property in Incline Village owned by Degen, and possibly, by Degen's wife Karyn Degen, as well. Plaintiff asserts that Brian purchased such property with illegal drug money he obtained in the criminal enterprise alleged in the indictment.

Brian currently resides in Switzerland and is aware of both the indictment and the civil forfeiture action. On April 6, 1990, Donald H. Heller, attorney for Brian and Karyn, filed separate claims for each of them to the property that is the subject of the forfeiture action. Heller also filed answers to the Amended Complaint for Forfeiture on behalf of Brian and Karyn.

Plaintiff filed a motion seeking to strike the claims and answers of both Brian and Karyn, and seeking summary judgment in its favor (document #8). Plaintiff claims that as a fugitive from justice, Brian is disentitled from appearing in the forfeiture action. The Degens, through Heller, filed an opposition (document #14).

Plaintiff filed a reply (document #20). Heller, on behalf of the Degens, filed a Request for Oral Argument on the Motion to Strike Claims and Answers and Motion for Summary Judgment (document #21). On December 27, 1990, this court heard oral argument from both sides on the motion for summary judgment and motion to strike, as against Brian only.

In this Order, we address only the Motion to Strike and Motion for Summary Judgment against Brian Degen. In tackling plaintiff's motions against Brian, we must first determine whether Brian is a fugitive from justice. Brian argues that he left Nevada and the United States for Switzerland before he knew of the indictment against him and before he knew of the civil forfeiture action. That is, he did not flee the country as a result of a criminal case against him.

However, case law indicates that to be a fugitive, a person need not flee the state or country with the intent of avoiding a prosecution or an anticipated prosecution. In *King v. United States*, 144 F.2d 729, 731 (8th Cir. 1944), the court held:

> To be a fugitive, . . . it is not necessary that the party should have left the state . . . where the crime is alleged to have been committed . . . for the purpose of avoiding an anticipated prosecution, but that, having committed a crime within a state . . ., he has left and is found in another jurisdiction.

In this case, whether Brian left before or after the indictment is irrelevant. Having allegedly committed a crime, Brian left the United States and is in Switzerland.

The Ninth Circuit has adopted the reasoning of the Eighth. In *United States v. Wazney*, 529 F.2d 1287, 1289 (9th Cir. 1976), the court held that an intent to avoid prosecution (conferring the "fugitive" status) could be inferred where the defendant knows that he is wanted by the police and fails to submit to arrest. The Ninth Circuit reaffirmed this decision in *United States v. Ballesteros-Cordova*, 586 F.2d 1321, 1323 (9th Cir. 1978) and *United States v. Gonsalves*, 675 F.2d 1050, 1052 (9th Cir. 1982). In this case, Brian knows that he is wanted by the police, but refuses to submit to arrest, even though he professes his innocence. Thus, we conclude that Brian Degen is a fugitive.

Having concluded that Brian is a fugitive, we now address whether the disentitlement doctrine precludes him from contesting the civil forfeiture action against him. In *Molinaro v. New Jersey*, 396 U.S. 365, 24 L. Ed. 2d 586, 90 S. Ct. 498 (1970), the Supreme Court refused to adjudicate the merits of an appeal from a criminal conviction because defendant was a fugitive. *Id.* at 366. The Court held that defendant's status as a fugitive "disentitle[d] [him] to call upon the resources of the Court for determination of his claims." *Id.* Thus, the disentitlement doctrine emerged for criminal proceedings.

In *Conforte v. Commissioner*, 692 F.2d 587 (9th Cir. 1982), the Ninth Circuit extended the disentitlement doctrine to a civil proceeding based on a prior criminal conviction. While this extension went beyond a criminal appeal, it did not address whether the disentitlement doctrine applies to a civil forfeiture proceeding. However, the Ninth Circuit addressed that issue in *United States v. $129,374 in U.S. Currency*, 769 F.2d 583 (9th Cir. 1985). The court noted:

> The issue before us in this case is one of first impression: whether the *Molinaro/Conforte* disentitlement doctrine should bar intervention in a civil forfeiture proceeding by a fugitive's successor in interest. We conclude that the limited extension of that doctrine to this situation is compelled as a matter of sound policy.

Id. at 587. If the disentitlement doctrine bars a fugitive's successor from defending a civil forfeiture proceeding, it surely also bars the fugitive. In fact, the *$129,374* court noted "If the fugitive is deprived of presenting any claim or defense in this action as the result of his fugitive status, the conservator of his estate must suffer the same consequences." *Id.* at 587. Thus, the disentitlement doctrine may apply to Brian Degen.

In opposing plaintiff's motions, Brian asserts that his case differs from *$129,374*. First, he presents many pages of assertions that he acquired the property in question with legitimate funds. This may well be true. However, Brian may not present this argument if the disentitlement doctrine bars him from defending the civil forfeiture proceeding. Whether the disentitlement doctrine applies is a standing issue. Determining the source of funds Brian

used to purchase the property goes to the merits of the forfeiture action. Thus, we need not determine the source of funds unless the disentitlement doctrine does not apply to Brian.

Brian also argues that his situation differs from the situation of the fugitive in *$129,374*. In that case, the fugitive was arrested, convicted and released on bond pending sentencing. Before sentencing, the fugitive fled the jurisdiction, with knowledge of the civil forfeiture proceeding. The court held that the fugitive and his successor in interest were disentitled from challenging the civil forfeiture because "the [disentitlement doctrine] should apply *with greater force* in civil cases where an individual's liberty is not at stake." *Id*. at 588.

However, in this case, plaintiff has not obtained a criminal conviction against the civil claimant. Brian argues that this factual variation should render the disentitlement doctrine inapplicable. In *$129,374*, the government had already obtained a criminal conviction against the civil claimant related to the property in question in the forfeiture action. Brian argues that the disentitlement doctrine should not apply when the civil claimant has not been convicted, but only faces an ongoing prosecution, as is the case with him. Brian notes that he was already in Switzerland when he was indicted and when plaintiff instituted the forfeiture action.

In *$129,374*, the Ninth Circuit stated explicitly that it need not decide whether the disentitlement doctrine applies when the fugitive seeks relief from forfeiture in the absence of a prior criminal conviction directly related to the property in question. Further, since *$129,374*, the Ninth Circuit has not addressed the issue. Thus, we must now decide for the first time whether the disentitlement doctrine should apply in the absence of a criminal conviction.

Other circuits have addressed this specific issue, and more generally, in what circumstances the disentitlement doctrine should apply to civil forfeiture proceedings. In reaching their conclusions, other courts have focused on five factors: (1) the policy behind the disentitlement doctrine; (2) the relatedness of the property in the forfeiture action to the crime; (3) the claimant's control over his fugitive status and his ability to assert his rights to the property in question; (4) whether the claimant is a "plaintiff" or a "defendant";

and (5) whether the government obtained a prior criminal conviction against the claimant.

(1) *The policy behind the disentitlement doctrine* - Various courts have offered interpretations of the policy behind the disentitlement doctrine. In *Molinaro*, *supra*, the Supreme Court announced that an individual should not be able to call upon the resources of a court to determine his claims when he flouts that court's power to prosecute him. In a general sense, Brian is attempting to do just that. He wants this court to listen to his claims in the forfeiture proceeding without subjecting himself to this court's jurisdiction in the criminal matter. On the other hand, Brian has not called upon the resources of the court to determine his claims. The United States has called upon the resources of the court. We will explore this situation in more detail in (4) below.

In *Katz v. United States of America*, 920 F.2d 610 (9th Cir. 1990), the court noted that the disentitlement doctrine prevents an individual from attempting to bargain with or obtain a tactical advantage over the court by awaiting a judicial result and returning to the jurisdiction if the result is favorable and remaining a fugitive if the result is unfavorable. That is, a person should not be able to invoke the power of judicial review and obey the order only if the person likes it.

In this case, applying the doctrine to Brian would not further this policy. If we allow him to defend against the forfeiture action, he will not return to this court's jurisdiction after this court reaches a decision, no matter the outcome. He will remain in Switzerland whether or not he forfeits his property. However, this policy would not be furthered even if Brian had already been convicted. In *$129,374*, the convicted claimant would not have returned to the jurisdiction had he been allowed to defend his interests, no matter the outcome. Thus, the Ninth Circuit has already rejected this policy argument.

In *United States of America v. $45,940 in United States Currency*, 739 F.2d 792, 797 (2nd Cir. 1984), the court noted that the disentitlement doctrine seeks to prevent a claimant evading federal authority from demanding that a federal court service a complaint the claimant initiated. In this case, Brian did not initiate action in this court. The government initiated the action and

claimant seeks only to defend against the action. However, once again, the Ninth Circuit has implicitly rejected this policy argument in *$129,374*. In that case, the claimant attempted to defend a forfeiture action the government instituted. The court refused to allow claimant to defend the action. Thus, whether the claimant has been previously convicted is irrelevant to the fact that he is evading federal authority.

(2) *The relatedness of the property in the forfeiture action to the crime* - In *$129,374*, the Ninth Circuit noted that a person flouting the legal process cannot engage the court's resources to adjudicate his claims in an *action related to* a prior conviction (emphasis added). *Id.* at 587. In that case, the property in question clearly related to the crime. As a result, the court explicitly refused to decide whether the claim must relate to the crime. *Id.* at 588. Thus, we must address this issue.

In *$45,940*, *supra*, the court applied the disentitlement doctrine to the claimant. In that case, the property in question clearly related to the crime. Similarly, in *United States of America v. One Parcel of Real Estate*, 868 F.2d 1214 (11th Cir. 1989), the court applied the doctrine only because the property in question related to the crime charged. However, the court implied that since the fugitive disentitlement doctrine is so broad, the government need only show facially, i.e., without any fact finding, that the property is related to the crime charged. *Id.* at 1216-17.

In *United States of America v. Pole No. 3172*, 852 F.2d 636, 644 (1st Cir. 1988), the First Circuit held that the criminal and civil proceedings must relate to each other for the disentitlement doctrine to apply. In refusing to apply the disentitlement doctrine, the court noted: "The two proceedings here - the civil forfeiture and the Florida criminal indictment - may very well be related. At this point, however, we can only speculate as to the contents of that indictment." Thus, the court implicitly agreed with the Eleventh Circuit. The *Pole* court did not apply the doctrine because it could not tell if the proceedings were related. However, it appears that if the *Pole* court had known the contents of the indictment, it would have determined facially whether the criminal and civil proceedings were related.

In this case, upon examining the indictment against Brian and in reading plaintiff's motion, the government alleges that Brian purchased the property it seeks to acquire in the forfeiture proceeding with proceeds of the criminal enterprise charged in the criminal proceeding. Thus, under the standards of the First and Eleventh Circuits, the criminal and civil proceedings are related.

(3) *The claimant's control over his fugitive status and his ability to assert his rights to the property in question* - In defining a fugitive, culpability lies in knowing that a prosecution is pending and refusing to return to the jurisdiction. The Ninth Circuit in *$129,374* noted and relied on the fact that:

> [The claimant] ha[d] complete control over the protection of his property interests in this forfeiture proceeding; if he f[ound] his interests [were] sufficiently worth defending, he [could] terminate his fugitive status and present his own defense. . . . Here, [the fugitive] is solely responsible for his plight.

Id. at 587-88. Similarly, Brian Degen is responsible for his own plight, with or without the previous conviction. If he considered his interests important enough, Brian could come back to Nevada, submit himself to the jurisdiction of this court, and defend his action.

In *$45,940*, *supra*, the government deported claimant from the United States before it began prosecuting him. In claiming that he could not come back to the United States, claimant argued he had no control over his fugitive status. The court rejected this argument, noting that the INS indicated it would not prosecute claimant for violating the immigration laws if he entered the United States to defend himself in the criminal prosecution. Further, claimant could have applied to reenter the country, yet chose not to do so. Thus, the court concluded, since claimant controlled his own status, and chose to evade United States authority, he was subject to the disentitlement doctrine.

Similarly, in *One Parcel*, *supra*, the court noted that claimant resided in Colombia, and knew of the proceedings in the United States. The court stated that claimant could defend the civil proceeding if he submitted himself to the jurisdiction of the American court.

In this case, Brian clearly has control over his fugitive status. If he wishes to return to Nevada to defend his forfeiture action and submit himself to this court's jurisdiction, nothing is stopping him.

In *Pole*, *supra*, contrary to the Second and Eleventh Circuits, the First Circuit noted that claimant never controls his fugitive status because he faces the dilemma of not "appearing" and losing because he cannot rebut the government's case. To defend his interests, the First Circuit noted, claimant would have to submit to the court's jurisdiction. Thus, the court refused to apply the disentitlement doctrine against claimant.

However, the court overlooked that claimant might "appear" in the civil proceeding without physically submitting himself to the court's jurisdiction. For example, claimant could file an affidavit or give his deposition out of the jurisdiction of the court in which the criminal proceeding is pending. Further, the First Circuit relied on the lack of evidence that claimant had notice of the civil proceeding and chose not to defend it, to avoid prosecution. In our case, Brian has notice of both the criminal and civil proceedings, and nonetheless chooses not to appear.

(4) *Whether the claimant is a "plaintiff" or a "defendant"* - In *$129,374*, the court did not decide whether the disentitlement doctrine applies only to those claimants who initiate the civil action (plaintiffs) because the claimant in that case had notice of the already filed forfeiture proceedings, yet voluntarily elected to flee the jurisdiction of the courts. In this case, it appears that Brian left the United States before the government initiated the forfeiture action. Thus, we address the merits of the issue.

In this case, Brian clearly has the status of a defendant. The government initiated the forfeiture proceeding. In making his claim, Brian technically is defending against the civil action. Thus, he is in effect involuntarily involved in the civil forfeiture action.

In *Pole*, *supra*, the First Circuit likened claimant to a defendant. Like Brian's case, in *Pole*, the government initiated a forfeiture action and claimant intervened to defend against the action. In refusing to apply the disentitlement doctrine to claimant, the court noted that claimant was not in the customary role of a party invoking the aid of a court to vindicate rights asserted against

another. *Id.* at 643. Thus, claimant had not invoked the processes of the court.

However, in *$129,374*, claimant also defended against a forfeiture action. Nonetheless, the court applied the disentitlement doctrine to bar claimant from defending the action. That case involved a prior criminal conviction and Brian's case does not. However, this factual difference does not affect the analysis of whether claimant initiated or is defending against the civil action. Further, in both *$45,940* and *One Parcel*, the courts applied the disentitlement doctrine to bar a claimant who was a "defendant."

(5) *Whether the government obtained a prior criminal conviction against claimant* - In *$129,374*, the Ninth Circuit explicitly refused to decide whether claimant must have suffered a prior conviction to have the disentitlement doctrine applied against him. As previously stated, no court in the Ninth Circuit has since considered the issue.

In *Pole*, *supra*, the court did not apply the disentitlement doctrine against claimant. In that case, the criminal proceeding against plaintiff was pending at the time of the civil forfeiture proceeding. However, the court did not rely on this circumstance as a basis not to apply the doctrine. Rather, as stated above, the court was more concerned with the relatedness between the property in question and the crime charged.

In both *$45,940* and *One Parcel*, supra, the courts applied the disentitlement doctrine against claimant. In both those cases the criminal prosecution and civil forfeiture proceedings were pending at the same time. Thus, in spite of the fact that no prior conviction existed, the courts applied the doctrine. Significantly, in both cases the property in question was related to the crime charged.

Taking these factors into consideration, we conclude that the disentitlement doctrine should be extended beyond *$129,374* to apply to Brian's case. Of the five factors, the Ninth Circuit in *$129,374* did not decide only the second and fifth. In light of our analyses under those two factors, it appears that the real property in question at least facially relates to the crimes charged. That is, the indictment indicates that Brian purchased the property with proceeds from a criminal enterprise. Thus, we conclude that in this case, the disentitlement doctrine bars Brian Degen from defending

the civil forfeiture action *in absentia*. He may attempt to show he acquired the property with legitimate funds if he loses his fugitive status.

Finally, Brian argues that this court has discretion whether to apply the disentitlement doctrine to him. He states that *$129,374* and *United States v. Veliotis*, 586 F. Supp. 1512, 1515 (S.D.N.Y. 1984) stand for this proposition. However, *Veliotis* is a district court case from New York. Nothing in *$129,374* indicates that a court has discretion to decide whether to apply the disentitlement doctrine in a civil forfeiture proceeding. We are bound by Ninth Circuit authority. In the absence of Ninth Circuit authority to support Brian's argument, we reject such argument. Thus, absent Brian's return to Nevada, he may not defend against plaintiff's civil forfeiture action.

IT IS, THEREFORE, HEREBY ORDERED that plaintiff's Motion to Strike Claims and Answers and Motion for Summary Judgment are GRANTED against Brian Degen only.

APPENDIX C

UNITED STATES OF AMERICA, Plaintiff,

v.

REAL PROPERTY LOCATED AT INCLINE VILLAGE, et al., Defendants.

No. CV-N-90-130-ECR

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

[ENTERED December 12, 1990]

ORDER

On October 24, 1989, a federal grand jury in Nevada returned an indictment against Brian J. Degen, charging him in various counts of *United States v. Ciro Wayne Mancuso*, et al., CR-N-89-24-ECR. A warrant was issued for Degen's arrest. On the same day, plaintiff instituted a civil forfeiture action against certain real property in Incline Village owned by Degen, and possibly, by Degen's wife Karyn Degen as well. Plaintiff asserts that such property was purchased with illegal drug money obtained by Degen.

Degen is currently living in Switzerland and is aware of both the indictment and the civil forfeiture action. On April 6, 1990, Donald H. Heller, attorney for Brian and Karyn, filed separate claims for each of them to the property that is the subject of the forfeiture action. Heller also filed answers to the Amended Complaint for Forfeiture on behalf of Brian and Karyn.

Plaintiff filed a motion seeking to strike the claims and answers of both Brian and Karyn, and seeking summary judgment in its favor (document #8). Plaintiff claims that as a fugitive from justice, Brian is disentitled from appearing in the forfeiture action. Plaintiff asserts that Karyn cannot appear as to property acquired before Brian and Karyn's marriage because such property is the separate property of Brian, and as such, Karyn would merely stand in Brian's shoes. The Degens, through Heller, filed an opposition (document #14). Plaintiff filed a reply (document #20). Heller, on

behalf of the Degens, filed a Request for Oral Argument on the Motion to Strike Claims and Answers and Motion for Summary Judgment (document #21).

In this Order, we address only the Motion to Strike and Motion for Summary Judgment against Karyn Degen. Plaintiff argues that to the extent the property in question is the separate property of Brian, Karyn has no interest in the property other than as the representative of Brian. That is, plaintiff posits that Karyn's claim is solely derivative of Brian's. Therefore, plaintiff asserts, under *United States v. $129,374 in U.S. Currency*, 769 F.2d 583 (9th Cir. 1985), Karyn may not defend the civil forfeiture action. Plaintiff concedes, however, that to the extent Karyn has an ownership interest herself in the property, the claims and answer should not be stricken (document #8, page 9, lines 9-13), and plaintiff may voice her claims (document #20, page 3, lines 12-20). Plaintiff further asserts that on the property in which Karyn has an ownership interest, the claims and answer should nonetheless be stricken because the property was acquired with illegal proceeds.

On a summary judgment motion, plaintiff's arguments must fail. First, whether any of the property in question was acquired by illegal proceeds is a factual dispute. In their response, the Degens go to extensive pains to demonstrate that they acquired the property with legitimate funds. Certainly, a factual issue exists as to what funds the Degens, or Brian Degen alone, used to purchase the property in question.

Second, no evidence exists to indicate that Brian Degen did not transmute the property he brought into the marriage into community property. Under Nevada community property law, some or all of the separate property that Brian Degen brought into the marriage may have become community property. Plaintiff concedes that two parcels of property are community. To this extent, Karyn may defend the civil forfeiture action. At this early state, we are not able to conclude that the rest of the property is the separate property of Brian. Thus, plaintiff's Motion to Strike Claims and Answers and Motion for Summary Judgment against Karyn Degen will be denied.

IT IS, THEREFORE, HEREBY ORDERED that plaintiff's Motion to Strike Claims and Answers and Motion for Summary Judgment are **DENIED**.

IT IS FURTHER ORDERED that Karyn Degen's Request for Oral Argument as to plaintiff's Motion for Summary Judgment against Karyn Degen is **DENIED** as moot.

DATED: December 11th, 1990.

s/ Edward C. Reed
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES of America, Plaintiff,

v.

REAL PROPERTY LOCATED AT INCLINE VILLAGE, et al., Defendants.

No. CV-N-90-130-ECR

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

[FILED June 24, 1993]

MINUTES OF THE COURT

June 23, 1993

PRESENT: EDWARD C. REED, JR. U.S. District Judge

Deputy Clerk: R. MILLER Reporter: NONE APPEARING

Counsel for Plaintiff(s) NONE APPEARING

Counsel for Defendant(s) NONE APPEARING

MINUTE ORDER IN CHAMBERS

IT IS HEREBY ORDERED that the United States' motion for summary judgment (document #83) is **GRANTED**.

Claimant has failed to file any memorandum in opposition to the United States' motion for summary judgment and the time permitted for such opposition has expired. Summary judgment must be granted pursuant to Local Rule 140-6 and this Court's Order of June 2, 1993 (document #101).

This Court previously entered an order (document #27) granting summary judgment against Brian Degen based on the Fugitive Disentitlement Doctrine. There are no other claimants in this matter and the Clerk shall enter judgment for the plaintiff and against the defendants.

CAROL C. FITGERALD, CLERK

s/ R. Miller
Deputy Clerk

APPENDIX E

UNITED STATES of America, Plaintiff,

v.

REAL PROPERTY LOCATED AT INCLINE VILLAGE, et al., Defendants.

No. CV-N-90-130-ECR

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

[FILED August 12, 1993]
[ENTERED August 17, 1993]

AMENDED JUDGMENT

This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. All persons with cognizable or potential claims to the below-described properties have been served with process in accordance with the Supplemental Rules for Certain Admiralty and Maritime Claims. Notice of the Complaint, as contemplated by said Supplemental Rules, was duly published.

2. Two persons, Brian J. Degen and Karyn Degen (husband and wife), filed claims to the defendant properties. No other claims were filed by any persons.

3. The United States' Motion for Summary Judgment is GRANTED, thereby disposing of all outstanding claims to the defendant properties below-described and forfeiting the below-described properties to the United States:

a) Real property commonly known as 1059 Tomahawk Trail, Washoe County, Incline Village, Nevada, more particularly described as:

Lot 21 in Block A of WHISPERING PINES, Washoe County, Nevada, according to the map thereof, filed in the Office of the County Recorder of Washoe County, State of Nevada, on February 5, 1968, as Tract Map No. 1953.

b) Real property commonly known as 4905 West Lake Boulevard, Placer County, Homewood, California, more particularly described as:

Lot numbered 136, as said lot is shown on that certain Map entitled "LAKESIDE SUBDIVISION", filed in the Office of the Recorder of Placer County, November 5, 1928 in Book A of Maps, at page 13.

c) Real property commonly known as 4915 San Souci Terrace, Placer County, Homewood, California, more particularly described as:

Lots numbered 233 and 234, as said Lots are shown on that certain Map entitled "San Souci Heights" filed in the office of the Recorder of Placer County, California in Book C of Maps, at page 16.

d) Real property commonly known as 6660 West Lake Boulevard, Placer County, Tahoma, California, more particularly described in Exhibit "A" attached hereto and incorporated herein.

e) Real property commonly known as 6664 West Lake Boulevard, Placer County, Tahoma, California, more particularly described in Exhibit "B" attached hereto and incorporated herein.

f) Real property commonly known as 6668 West Lake Boulevard, Placer County, Tahoma, California, more

particularly described in Exhibit "C" attached hereto and incorporated herein.

g) Real property commonly known as 3060 North Lake Boulevard and 3080 North Lake Boulevard, Placer County, Lake Forest, California, more particularly described in Exhibit "D" attached hereto and incorporated herein.

h) Real property commonly known as 3457 Waikomo Road, Koloa, Kauai, Hawaii, more particularly described in Exhibit "E" attached hereto and incorporated herein.

i) Real property commonly known as 5132 Hoona Road, Kauai, Hawaii, more particularly described in Exhibit "F" attached hereto and incorporated herein.

j) The business enterprise known as Koloa Self Storage, which enterprise is operating on the premises described in item (h) above, and any property interests, real or personal, owned by said business enterprise.

k) The business enterprise known as KES, a Cayman Islands corporation, which enterprise may be owner of record of the real property described in item (i) above, and any property interests, real or personal, owned by said business enterprise.

l) The business enterprise known as Pacific Builders and any property interests, real or personal, owned by said business enterprise.

m) The business enterprise known as Pacific Design and Construction Co. and any property interests, real or personal, owned by said business enterprise.

n) Proceeds, wherever they may be found, from the sale of the following described real property:

i) 623 Alma Way, Zephyr Cove, Nevada.

ii) 4515 Interlaken Road, Tahoe City, California.
iii) 4520 Interlaken Road, Tahoe City, California.
iv) 1180 Big Pine Drive, Tahoe City, California.
v) 389 Alder Court, Incline Village, Nevada.
vi) 5166 Lawaii Road, Kauai, Hawaii.

o) The following described bank accounts and funds on deposit therein:

i) First Hawaiian Bank (Koloa Branch) Account Number 23-022923.
ii) First Hawaiian Bank (Koloa Branch) Account Number 23-248816.
iii) Bank of America (Fruitridge Manor, Sacramento) Account Number 05710-07304.
iv) Bank of America (Tahoe City, California) Account Number 06099-01369.

p) The following described items of personal property (with corresponding DEA seizure number):

i) 1983 Correct Craft/Ski Nautique (DEA # 84026).
ii) 1984 Ford Truck 4x4, Nevada license number 871 AMB (DEA # 69775).
iii) 1982 Volvo Station Wagon, California license number 1EKX 571 (DEA # 69776).
iv) Wood Desk with Folding Front (DEA # 713-84).
v) Two Bookshelves (DEA # 71385).
vi) China Cabinet with Glass Doors and multiple drawers (DEA # 71386).
vii) Iranian Persian Rug, Multi-colored (DEA # 71387).
viii) Minolta Copy Machine with white metal stand, serial number 1657250 (DEA # 713-88).
xi) Two "Woodmark Originals" Chairs (DEA # 71389).

x) "Old Dominion" Kittinger Dining Room Set - One table and eight chairs (DEA # 71390).
xi) Gym Equipment (DEA # 71391).
xii) 1,198 bottles of wine (DEA # 71392).
xiii) 1980 Case Tractor, Model 1845, Serial Number 9851211, and accessories thereon (DEA # 71393).
xiv) One wood-frame dining table (DEA # 71647).
xv) Chinese wool rug with central circular dragon design (DEA # 71648).
xvi) 13 piece upholstered rattan living room set (DEA # 71649).
xvii) Chinese wool rug with central circular crane design (DEA # 71650).
xviii) J.I. Case Beckhoe Tractor, Model 580B, Serial number 5336127 (DEA # 71651).
xix) 1980 Ford pickup truck, Hawaii License number 839 KAA (DEA # 71267).
xx) IBM personal system 2 computer (serial number 72-8020935), keyboard (serial number 2156983), color monitor (serial number 0022318), proprinter II XL24 (serial number 2912075) (all designated under DEA # 734-25).
xxi) 1987 Jeep Wrangler, Hawaii license number KEC 435 (DEA # 71269).
xxii) 1982 Maroon Oldsmobile Cutlass station wagon, Hawaii license number BGE 157 (DEA # 71273).

4. The United States Marshals Service shall dispose of the above-described properties according to law.

Judgment is hereby entered in favor of the United States and against each of the above-described defendant properties.

DATED: August 12, 1993.

s/ Edward C. Reed
EDWARD C. REED, JR.
United States District Judge

* * * * *

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. REAL PROPERTY LOCATED AT INCLINE VILLAGE, et al., Defendants, BRIAN J. DEGEN and KARYN DEGEN, *Claimants-Appellants*.	No. 93-16996 D.C. No. CV-90-00130-ECR

Appeal from the United States District Court
for the District of Nevada
Edward C. Reed, Jr., District Judge.

Argued and Submitted
December 16, 1994 — San Francisco, California

Before: Joseph T. Sneed, William A. Norris,
and Cynthia Holcomb Hall, Circuit Judges.

ORDER

May 5, 1995

Appellant Brian Degen's Motion for Leave to File Reply in Support of Petition for Rehearing and Suggestion for Rehearing En Banc is DENIED.

The opinion filed February 10, 1995, is amended to include the following new footnote number 2, inserted after the last word on page 1518:

> While this appeal was pending, the Supreme Court decided *United States v. James Daniel Good Real Property*, 126 L. Ed. 2d 490, 114 S. Ct. 492 (1993), which held that seizure of real property for forfeiture without prior notice and a hearing violates the owner's due process rights under the Fifth Amendment. If not for Brian's fugitive status, the rule of *Good* would apply to this case. *See United States v. Real Property Located at 20832 Big Rock Drive*, No. 93-55281, slip op. 3843, 1995 WL 150859 (9th Cir. Apr. 7, 1995). However, the fugitive disentitlement doctrine precludes Brian from contesting the government's seizure of his properties.

The subsequent footnotes in the opinion shall be renumbered accordingly.

With these amendments, the panel has voted unanimously to deny the petition for rehearing. Judge Hall votes to reject the suggestion for rehearing en banc and Judges Sneed and Norris so recommend. The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX G

21 U.S.C. § 881(a):

The following shall be subject to forfeiture to the United States and no property right shall exist in them: * * *

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange * * * except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title and interest (including any leashold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner. * * *

Rule C(6), Supplemental Rules for Certain Admiralty and Maritime Claims:

Claim and Answer; Interrogatories. The claimant of property that is the subject of an action in rem shall file a claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall file an answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. * * *